

NOTE

The Infancy Defense in the Modern Contract Age: A Useful Vestige

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Most parents admit that teens can be baffling creatures. Whether slumped in front of the TV or locked away in a bedroom, teenagers can be a formidable group—communication with them is no easy task, even for those who live within the same household. For companies looking to develop and market products to the younger generation, the challenge takes on added significance: teens are a complex group who can be a highly lucrative market.¹

Although children have long participated in the consumer marketplace, until recently they were bit players, purchasers of cheap goods. They attracted little of the [marketing] industry's talent and resources That has changed. Kids and teens are now the epicenter of American consumer culture. They command the attention, creativity, and dollars of advertisers Yet few adults recognize the magnitude of this shift and its consequences for the futures of our children and our culture.²

I. INTRODUCTION

Today's children are subjected to a constant stream of advertisements.³ By age three or three-and-a-half, children start to believe that

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1. *New Book Helps Marketers in "Getting Wiser to Teens,"* TRU-TEENS, TWEENS, AND TWENTY-SOMETHINGS RESEARCH (June 21, 2004), http://www.tru-insight.com/pressrelease.cfm?page_id=214.

2. JULIET B. SCHOR, *BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE* 9 (2004).

3. *Id.* at 19–20. American children view an estimated 40,000 commercials annually. *Id.* at 20.

brands communicate their personal qualities, and by the time they start school, typical first graders can name 200 brands.⁴ Because of the increase in their disposable income, children and teen consumers have been recognized as a huge market, and accordingly, advertisers have ruthlessly targeted them.⁵ What has emerged is the most brand-loyal, consumerist generation this nation has ever seen.⁶ At the same time, the process of entering into contracts is less formalistic, parties' bargaining power is less equal, and consumers are far more likely to enter into an agreement without full knowledge of the terms.⁷ A contract that formerly took weeks of negotiation and hours of reading fine print may now be sealed merely through a click.⁸ Obligations can even arise when a user simply browses a website, without clicking anything.⁹

Because of these concomitant trends, it is important to reexamine an antiquated legal principle designed to protect children: the infancy defense. The infancy defense has existed for ages as a common law defense to liability under a contract to protect those who are legally incompetent from entering into unwise bargains. The doctrine essentially allows children to avoid liability under unfavorable contracts. This doctrine represents society's concern that children are not capable of properly evaluating the risks and benefits of a contract and are, therefore, susceptible to manipulation by adults and businesses with more knowledge and bargaining power.¹⁰

For almost as long as the infancy defense has been employed in the common law, commentators have speculated about its efficacy.¹¹ Among other things, critics have argued that children are often as, if not more, competent with technology than adults, making them too sophisti-

4. *Id.* at 19.

5. See generally Alan Chapell, *What a Teen Consumer Wants*, IMEDIA CONNECTION (Oct. 19, 2004), <http://www.imediaconnection.com/content/4423.imc>; TRU-TEENS, TWEENS, AND TWENTY-SOMETHINGS RESEARCH, <http://www.tru-insight.com/> (last visited Apr. 1, 2010).

6. SCHOR, *supra* note 2, at 13.

7. Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-For Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 469-70 (2008).

8. ONLINE CONTRACT FORMATION 328 (N. Stephan Kinsella & Andrew F. Simpson eds., Oceana Publ'ns 2004).

9. *Id.* at 329 ("[T]he visitor to the website is deemed to have accepted the website owner's offer by continuing to browse that website.").

10. See, e.g., *Halbman v. Lemke*, 99 Wis. 2d 241, 245 (1980) ("Although the origins of the doctrine are somewhat obscure, it is generally recognized that its purpose is the protection of minors from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace.").

11. See, e.g., Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481 (1994); Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205 (1967); Comment, *Liability of an Infant for Fraudulent Misrepresentation*, 31 YALE L.J. 201 (1921).

cated to merit such protection.¹² Critics have also accused the defense of functioning more as a sword than a shield, empowering children to bilk adults relying on their business legitimacy.¹³ Children become mature much earlier in these modern times, not just physically,¹⁴ but economically.¹⁵ They are provided many more opportunities to be economically productive members of society.¹⁶ For these reasons, many contend that the infancy defense is an anachronistic doctrine that stifles commerce and is unsuitable in modern society.

Arguments against the infancy defense are prevalent, and their reasoning is reflected in myriad exceptions to the defense's application;¹⁷ however, these arguments are also flawed. Their infirmity is that they do not address the fundamental problem of the balance of power between children and adults. Additionally, these arguments do not consider the nature of the modern marketplace and contractual practices, or how abrogation of the infancy defense might affect the behavior of the companies that deal with children. Modern society, in which children purportedly no longer need protection, is fraught with consumerism,¹⁸ work-and-spend economic cycles,¹⁹ enormous consumer debt,²⁰ and vigorously targeted and aggressive marketing towards minors.²¹ With the increased control large corporations exert over everything we read, watch, and buy, minors are still a vulnerable group in need of protection. An examination of modern contract practices, business marketing strategies, and typical consumer financial circumstances reveals that the infancy defense is not a vestige of a bygone era but, in fact, remains as important now as ever.

Additionally, the infancy defense has grown and adapted to changing times. Courts no longer rigidly apply a rule allowing minors to disaffirm; instead, they balance equities and employ a number of exceptions to the infancy defense.²² As long as the defense is applied judiciously, these exceptions answer concerns about the doctrine's application in

12. Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 254–56 (2008).

13. Edge, *supra* note 11, at 205–06.

14. Michelle Roberts, *Why Puberty Now Begins at Seven*, BBC NEWS, May 15, 2005, <http://news.bbc.co.uk/2/hi/health/4530743.stm>.

15. SCHOR, *supra* note 2, at 23.

16. SCHOR, *supra* note 2, at 23.

17. *See infra* Part II.A.

18. SCHOR, *supra* note 2, at 10.

19. SCHOR, *supra* note 2, at 10.

20. *See* THE FEDERAL RESERVE, FEDERAL RESERVE STATISTICAL RELEASE: CONSUMER CREDIT (2010).

21. *See generally* SCHOR, *supra* note 2.

22. *See* discussion *infra* Part II.

modern times. And unlike a proposal to eliminate the defense, these exceptions address concerns regarding the infancy defense without dramatically increasing the risk to youth who enter improvident deals.

This Note argues that the state of a modern consumer society, when evaluated against the culture of marketing and consumerism surrounding America's youth, calls for persisting protection of children in contract formation through retention of the infancy defense. Part II of this Note introduces the infancy defense, the philosophy behind it, the various exceptions to the defense, and how these exceptions have adapted to the modern marketplace to assure equitable results for adults. This Part also discusses other arenas of the law in which children are afforded special protection. Part III addresses the current state of the infancy doctrine as demonstrated in the 2008 Virginia case *A.V. v. iParadigms*,²³ in which the United States District Court for the Eastern District of Virginia dismissed high school students' attempts to disaffirm an online contract under the infancy defense, holding that the plaintiffs could not disaffirm because they had retained the benefits of the contract.²⁴ Part IV replies to the predominant arguments against the infancy doctrine and explains why equitable concerns about the infancy defense's impact on adults are unwarranted. Part V examines the ongoing relevancy of the infancy defense in light of technological advancements, suggesting ways in which minors continue to be vulnerable to more sophisticated adults and businesses. This includes a discussion of the commercialization of childhood and the ways in which marketing companies target children in order to further the prevalence of materialism, consumer debt, and the earn-and-spend lifestyle. This Part also discusses the types of agreements that are prevalent online, such as adhesion contracts and clickwrap agreements, and argues that young people are particularly incompetent to consent to these forms of contracts. Finally, Part VI concludes with the contention that the infancy defense is still important and should be retained with its current exceptions.

II. THE LAW'S PROTECTION OF YOUTH

A. *An Overview of the Infancy Defense*

The infancy law doctrine is one of the most venerable traditions in the common law.²⁵ It represents society's determination that minors lack

23. *A.V. v. iParadigms, Co.*, 544 F. Supp. 2d 473 (E.D. Va. 2008).

24. *Id.* at 481.

25. "The right of an infant to avoid his contracts is an absolute and paramount right, superior to all equities of other persons, and may therefore be exercised against *bona fide* purchasers from the grantee." 1 J.I. CLARK HARE & H.B. WALLACE, *AMERICAN LEADING CASES: BEING SELECT*

the mental capacity for a meeting of the minds—a requirement for contract formation.²⁶ The doctrine exists to protect minors from “foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the market place.”²⁷ Under the traditional common law infancy doctrine,²⁸ still largely in effect today,²⁹ contracts entered into by minors fell into one of three categories: “void, when clearly prejudicial to the child; voidable, when possibly in the child’s best interest; and valid, when clearly in the child’s best interests.”³⁰ Today, the doctrine is simplified with a general rule that all contracts entered into by minors can be disaffirmed by the minor before reaching the age of majority.³¹

The common law has grown to include several exceptions to the infancy defense. The two most significant and generally accepted exceptions are contracts for necessities and contracts in which the minor has retained a benefit. The first precludes invocation of the infancy defense in minors’ contracts for necessities.³² What constitutes a necessary is not fixed, but depends upon factors such as the child’s standard of living and individual circumstances, and the child’s ability to obtain necessities from his or her parent or guardian.³³ The adaptability of this definition of necessities serves to protect those adults who, in good faith, enter into contracts with minors and provide them what they need to survive.

The other most common exception to the infancy doctrine is the benefits exception, which states that a minor will be liable on a contract if she has retained a benefit.³⁴ The infancy defense allows minors to disaffirm contracts on the condition that they make restitution of benefits

DECISIONS OF AMERICAN COURTS, IN SEVERAL DEPARTMENTS OF LAW: WITH ESPECIAL REFERENCE TO MERCANTILE LAW: WITH NOTES 264 (2d ed. 1851); *Myers v. Saunders’ Heirs*, 7 Dana 506, 521 (1838); *Hill v. Anderson*, 13 Miss. 216, 224 (1845).

26. RESTATEMENT (SECOND) OF CONTRACTS §17 cmt. c (1981) (referring to the manifestation of mutual assent element as a “meeting of the minds”).

27. *Halbman v. Lemke*, 99 Wis. 2d 241, 245 (1980).

28. REUBEN M. BENJAMIN, *THE GENERAL PRINCIPLES OF THE AMERICAN LAW OF CONTRACT* 51, 132 (2d ed. 1907) (“The following persons are incapable wholly or partially of binding themselves by contract: Minors. Persons of unsound mind. Drunken persons. Persons under conservators. Corporations.”).

29. *See* E. ALLAN FARNSWORTH, *CONTRACTS* § 4.3 (4th ed. 2004).

30. DONALD T. KRAMER, *1 LEGAL RIGHTS OF CHILDREN* §10:1 (rev. 2d ed. 2005).

31. *Id.*

32. This concept first arose in *Zouch v. Parsons*, in which the court held that children were liable for their contracts for life-supporting goods on the “ground of necessity.” (1765) 97 Eng. Rep. 1103 (K.B.) 1107; 3 Burr. 1794.

33. *Rodriguez v. Reading Hous. Auth.*, 8 F.3d 961 (3d Cir. 1993) (public housing authority was justified in refusing to lease to the plaintiff, who was a minor single parent, because housing might not be a necessary and the minor could disaffirm the lease).

34. 5 WILLISTON ON CONTRACTS § 9:14 (4th ed. 2009). Based on unjust enrichment, this exception prevents minors from unfairly profiting from their transactions.

received.³⁵ This doctrine is criticized because it can allow minors to return goods in far worse shape than they received them.³⁶ One might argue that the long-standing nature of the infancy doctrine generally means an adult transactor should be on notice that a contract with a minor is not enforceable;³⁷ however, courts have responded to critics' concerns, and it is widely understood that a refusal to allow disaffirmance where the benefits retained are not returnable would be inequitable.³⁸ In these cases, courts enforce the contracts with minors on the basis that the minors have retained the benefits of the contract.³⁹

Though the benefits exception arose as a means of ensuring fairness to adult parties contracting with minors, it should be used judiciously, as its application can also create inequitable results for children. This is often the case when the contract is for intangible goods because they are impossible to return.⁴⁰ An example of a dubious modern application of the exception appears in *A.V. v. iParadigms*, in which the court stretched the notion of "benefit" to nearly absurd limits and then refused to allow disaffirmance because the plaintiffs could not return the benefits they had received.⁴¹ Despite this application, the benefits exception, when properly applied, is useful because it gives adults some security that they will not be taken advantage of when transacting with minors.

The necessities and benefits exceptions are the predominant exceptions from the infancy defense, but other minority rules have cropped up in numerous states.⁴² The growing number of exceptions is further proof

35. DiMatteo, *supra* note 11, at 490.

36. DiMatteo, *supra* note 11, at 491 ("[The benefits exception] is an unholy compromise at best. A minor is still allowed to disaffirm a contract, significantly waste away or destroy the good or service, and still only be held accountable for an amount based on the nebulous notion of 'the benefit received.'").

37. "He who deals with an infant deals at his peril, and subject to this right of the infant to disaffirm and avoid the contract." *Mustard v. Wohlford's Heirs*, 56 Va. (15 Gratt.) 329, 340 (1859).

38. See 5 WILLISTON ON CONTRACTS § 9:16 (4th ed. 2009) ("The prevailing rule, which allows an infant to rescind an executed transaction without restoring what the minor has received, may often result in gross injustice.").

39. See *infra* Part II.

40. See, e.g., *Sheller ex rel. Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150 (N.D. Ill. 1997). In a highly questionable decision, two minors who were employed by the defendant and allegedly sexually harassed during their employment could not disaffirm an arbitration provision contained in their application for employment. The *Sheller* court ruled that the fact that the plaintiffs were minors was irrelevant because if the minors had never signed the application with the arbitration provision, they could not have been hired, and therefore, allowing the minors to disaffirm the contract would permit them to retain the advantage of the employment that entitled them to bring the Title VII action while disaffirming the entire basis of their employment. While it is generally true that a minor cannot disaffirm a contract while retaining its benefits, it can hardly be said that sexual harassment is a benefit of employment.

41. *A.V. v. iParadigms Co.*, 544 F. Supp. 2d 473, 473 (2008). See discussion *infra* Part III.

42. DiMatteo, *supra* note 11, at 492.

that the doctrine is in danger. These include “the depreciation rule,” the “status quo rule,” the “emancipation doctrine,” the “misrepresentation of age rule,” and the “business rule.”⁴³ An analysis of each varying exception is beyond the scope of this Note, yet these exceptions show that states have chipped away at the infancy defense, creating exceptions to protect adults in a variety of situations while leaving minors increasingly unprotected.

B. Other Ways in Which Children Are Protected Under the Law

Children are afforded special protection under the law in several areas. Underlying the various protections for minors is an understanding that children lack capacity in ways adults do not and a corresponding uncertainty as to how to deal with that fact.⁴⁴ Different fields of law vary as far as what the determining factors are for capacity; however, each arena weighs protecting children and their position as less mature and rational actors against society’s interest in treating them like adults. One of the important factors to be assessed is the nature of the minor’s activity.⁴⁵ The weight of this factor is evident in contract law specifically, where the nature of the bargain struck determines, in large part, whether the court will view the child as a competent actor capable of consent.⁴⁶

Many areas of law recognize that minors do not have the same capacity for decision making as adults. For instance, in criminal law, a minor’s consent to sexual contact does not absolve that minor’s sexual partner.⁴⁷ Similarly, juvenile criminal defendants are, for the most part, treated differently than adult offenders. For example, juveniles are not considered to have the capacity to make rational choices punishable by death.⁴⁸ In tort law, the reasonable person standard is altered for child-

43. DiMatteo, *supra* note 11, at 492.

44. 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, 277 (2006) (“The law of children has developed in a patchwork and inconsistent fashion. Decisionmakers including Congress, state legislatures, the Supreme Court, and state courts have created laws and decided cases without a comprehensive vision of what it means to be a child or how children think and behave.”).

45. *Id.* at 279 (“‘Competency’ according to the noted bioethicists Beauchamp and Childress is ‘the ability to perform a task.’ Competency is therefore relative to the task that is being considered.”).

46. See discussion of the necessities doctrine, *supra* Part II.A, explaining that the nature of the item bargained for will, in many cases, determine whether the child will be held liable.

47. MODEL PENAL CODE § 213.3 (1985). Under the Model Penal Code, it is a felony to engage in consensual intercourse where the victim is less than sixteen years old and the actor is at least four years older than the victim. *Id.*

48. *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the death penalty should not be used on juveniles); see also Charles Lane, *5–4 Supreme Court Abolishes Juvenile Executions*, WASH.

ren; instead of behaving as a reasonable person would, the defendant must have acted with the amount of care to be expected from a child of that age and with those particular characteristics.⁴⁹ Indeed, the special circumstances of children and their unique status under the law is manifest in many areas. For this reason, it is not surprising that special rules apply to children's dealings in the economic marketplace.

III. THE INFANCY DEFENSE TODAY: THE *IPARADIGMS* DECISION

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Although the infancy defense is still in place as a necessary protection of children's rights, courts are increasingly reluctant to disaffirm contracts on that basis. In a recent example of a failed attempt to invoke the infancy defense, high school students in Fairfax, Virginia, and Tucson, Arizona, were required to accept the above clickwrap agreement from Turnitin, a subsidiary of iParadigms, in order to submit their school work.⁵¹ Turnitin is an antiplagiarism program that helps combat the scourge of high-school plagiarism by maintaining a large database of submitted papers and comparing new submissions against those in the

POST, Mar. 2, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A62584-2005Mar1.html>.

49. Critics of the infancy defense claim that treatment of minors in contract law should more closely resemble criminal law and torts, which generally act to hold minors more accountable for their actions. See, e.g., DiMatteo, *supra* note 11; Daniel, *supra* note 12. What these critics do not address, however, is the presence in criminal law and tort law of an innocent and victimized party and of harm. Accountability in those arenas is more vital because of society's interest in retribution or an individual's interest in compensation. In contract law, both parties are assumed to have consented to the bargain. Absent reasonable reliance on a misrepresentation of age (discussed *infra* Part IV.), the adult dealing with a minor has knowingly accepted the risk of later disaffirmance.

50. *Usage Policy*, TURNITIN, http://www.turnitin.com/static/footnote/usage_policy.html (last visited Apr. 3, 2010).

51. *A.V. v. iParadigms Co.*, 544 F. Supp. 2d 473, 473 (2008). Clickwrap agreements are a form of online contracts that came into use when software vendors began to distribute software preinstalled or downloaded over the Internet. "Upon downloading, installation, or first use of the program, a window containing the terms of the license opens for the user to read. The user is asked to click 'I agree' or 'I do not agree.' If the user does not agree, the process is terminated." ONLINE CONTRACT FORMATION, *supra* note 8, at 328.

database to detect copying.⁵² The program prepares an originality report, which is submitted to the teacher to use in evaluating the students' work.⁵³ To submit assignments, students must agree to the terms, meaning their papers must become part of Turnitin's database subject to the terms shown above.⁵⁴ The plaintiffs in *iParadigms* clicked "I Agree" to be able to submit their papers for grades. But, in an attempt to prevent collection of their written works, they included a disclaimer on the face of the documents indicating that they did not consent to Turnitin's archiving of the work.⁵⁵ Nevertheless, Turnitin archived the work, and the students brought an action for copyright infringement.⁵⁶

The district court found for the defendant on a number of grounds.⁵⁷ Regarding the plaintiffs' assertion of the infancy defense—that they should be permitted to disaffirm the contract because they were minors when they accepted the terms and agreements⁵⁸—the court found this doctrine not applicable because the plaintiffs had retained the benefits of the contract.⁵⁹ Yet the retained benefits the court cited were meager: "They received a grade from their teachers, allowing them the opportunity to maintain good standing in the classes in which they were enrolled. Additionally, Plaintiffs gained the benefit of standing to bring the present suit."⁶⁰ This denial of the infancy defense, although based on an age-old doctrinal exception, relies on considerable creativity in defining the word "benefits," leading several commentators to opine that this definition may mean the end of the utility of the infancy defense.⁶¹

52. Stephen Sharon, *Do Students Turn Over Their Rights When They Turn in Their Papers? A Case Study of Turnitin.com*, 26 *TOURO L. REV.* 207, 212 (2010).

53. *Id.*

54. *Id.* at 214.

55. *iParadigms*, 544 F. Supp. 2d at 478.

56. *Id.*

57. The case was subsequently appealed, and the plaintiffs lost again on the basis that Turnitin's use of their written work was permitted under the fair use doctrine. In reaching a decision on these grounds, the court did not address and, therefore, left intact the lower court's ruling on the contract defenses. *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

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

59. One commonly used exception to the infancy defense is when the child is deemed to have retained the benefits of the contract and is not able to return them. 5 *WILLISTON ON CONTRACTS*, § 9:6 (4th ed.). This exception is covered in greater detail in Part III, *infra*.

60. *iParadigms*, 544 F. Supp. 2d at 481. Though there have not been any cases relying on this rationale since *iParadigms*, the idea that standing itself is a sufficient benefit to prevent disaffirmance is a serious threat to the ongoing strength of the infancy defense.

61. See, e.g., Claude Aiken, *VA Court OKs Enforcement of Clickwrap Contract Against Minors*, ZONKIO: NEWS, TECH LAW, WEB INSIGHTS, May 5, 2009, http://www.zonkio.com/va-court-oks-enforcement-of-clickwrap-contract-against-minors_1525.html ("Under this test, any irrevocable benefit that happens as a result of the contract would suffice to destroy the infancy defense In an age where services are migrating to the cloud and most services have extensive clickwrap contracts attached to them, are we losing the infancy defense altogether?"); Jeff Neuburger, *Are Clickwrap Agreements with Minors Enforceable? The Fourth Circuit Won't Say, But the District Court*

The *iParadigms* decision illustrates both the modern view of the infancy defense and one of the ways in which the exclusions to its application have grown. It also shows the extent to which youth lack bargaining power and the ability to make their own contractual decisions, thereby underscoring the need to protect them from improvident deals. First, the court cursorily refused to apply the infancy defense because, it reasoned, the students had retained the benefits of the bargain. As noted, these benefits were minimal. Second, the students did not enter into the contract with *iParadigms* in order to gain these benefits; rather, the benefits were thrust upon them.

An expansion of the notion of benefits to include involuntary gains from one-sided contracts entered into against one's will drastically broadens the category of contracts to which the infancy defense does not apply. The *iParadigms* court's analysis exemplifies the modern disdain for the infancy defense and is consistent with a desire to effectively nullify it. Further applications like this will contribute to the doctrine's demise and leave youth unprotected in the economic marketplace.

This case also shows how helpless children are without the defense. The student-plaintiffs in *iParadigms* did not wish to archive their work, and they communicated their intent not to be bound by writing declarations to that effect on the documents they submitted. They could not merely refuse to submit their documents as their teachers required them to use the site. By enforcing the terms of the contract, the court furthered the injustice done to the students by taking away their one recourse, the infancy defense. The students' attempts to bargain with the company, and the court's subsequent enforcement of the contract, show how the drastically uneven bargaining power impacts teens in the marketplace.

Because of the threat to the infancy defense from precedent like *iParadigms*, which expanded the benefits exception beyond reasonable limits, the ongoing utility of the doctrine must be examined before it is lost entirely. An exception to the defense that allows courts to enforce contracts when the minor retains benefits from a contract is fair. If minors are willing participants in a contract and retain the benefits of the

Said Yes, PROSKAUER: NEW MEDIA & TECHNOLOGY LAW BLOG, Apr. 30, 2009, <http://newmedialaw.proskauer.com/2009/04/articles/contracts/are-clickwrap-agreements-with-minors-enforceable-the-fourth-circuit-wont-say-but-the-district-court-said-yes/> (“[T]he district court’s treatment of the infancy defense is very favorable to the enforceability of clickwrap agreements executed by minors.”); Thomas O’Toole, *Turnitin.com Lawsuit Yields Rulings on Browse-wrap Contracts*, *Fair Use of Copyrighted Expression*, E-COMMERCE AND TECH LAW, Mar. 18, 2008, <http://pblog.bna.com/techlaw/2008/03/turnitin-lawsui.html> (“Some benefits. The benefit of bringing a lawsuit that the court is tossing, and the benefit of participating in a high school anti-plagiarism exercise. This seems to be an awfully low standard. Any Web site catering to children should be able to cite equally valuable ‘benefits’ from using their online services, so you have to wonder how much use the infancy defense will be to future online plaintiffs.”).

contract, then it is equitable to require them either to keep their promises or to return any benefit received.⁶² But the court's treatment of this exception in *iParadigms* goes too far, effectively taking a symbolic step towards eradicating the defense altogether.

IV. THE CASE AGAINST THE INFANCY DEFENSE: OVERCOMING COMMON COUNTERARGUMENTS

The perseverance of the infancy defense has been described as “a prime example of the retooling of an ancient doctrine to survive, at least in name, in a modern world whose social-economic matrix is far detached from the normative and jurisprudential roots of this contractual restriction on the freedom of contract.”⁶³ Commentators have been calling for the end to the doctrine for decades, and the advent of the Internet seems only to have encouraged them.⁶⁴

This Part introduces and rebuts some of the common arguments against retaining the infancy defense. First, critics argue the doctrine allows children to unfairly take advantage of adults, but this concern is unwarranted, as the doctrine has expanded to include numerous exceptions to protect adults. Second, the argument that age is an arbitrary guide for capacity to consent fails because of the prevalence of such bright-line rules in various areas of law. Third, the infancy defense does not reduce accountability and promote poor moral values among minors because the exceptions to the defense require children to make restitution of benefits received. Finally, arguments that rely on children's cognitive capacity oversimplify the issue and fail to consider the diversity of maturity among children and the complexity of contracts. Because these arguments fail to adequately justify leaving youth unprotected, the infancy defense must be maintained.

62. Similarly, the necessities exception is fair. If an adult provides a minor something necessary for survival, that adult should receive the benefit of the contract. Precluding the infancy defense in contracts for necessities gives adults incentives to deal with minors in situations where it is the most important.

63. DiMatteo, *supra* note 11, at 482.

64. Daniel, *supra* note 12, at 254.

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” 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 contracts in cyberspace.

Id.

A. *The Infancy Defense Does Not Give Minors an Unfair Advantage in the Marketplace*

A common complaint about the infancy law doctrine is that it punishes good faith adult transactors who accidentally deal with minors.⁶⁵ The commonly cited example is that a teen can purchase an automobile, destroy it, then disaffirm the contract and demand a full refund.⁶⁶ Although principles invoked in common law generally work to remedy inequitable results when an adult has reasonably relied on a child's misrepresentation of his age,⁶⁷ the Internet complicates this problem. Businesses making contracts over the Internet have no real means of ensuring that the party with whom they are dealing is an adult,⁶⁸ and it is extremely easy for even a young child to pretend to be an adult and engage in adult business activity online.

The potential that children could take advantage of adults is a valid concern with the application of the infancy defense; however, courts deal with this problem when it arises by employing the numerous exceptions to the defense. The flexibility of the common law has allowed courts to adapt the doctrine to the changing roles of minors. As described in Part II, the concept of necessities has grown to include a wide array of contracts, and the notion of benefits has further restricted the types of contracts minors can disaffirm. Although the *iParadigms* decision expands this notion to an extreme level, rendering the defense practically mea-

65. See, e.g., DiMatteo, *supra* note 11.

66. See *Halbman v. Lemke*, 99 Wis. 2d 241, 247–50 (1980) (When the vehicle a minor had purchased broke down five weeks after sale, the minor was awarded his money back and was not required to pay the repair costs. The court held that absent a misrepresentation of tortious damage to property, a minor who disaffirms a contract for purchase of an item which is not a necessity may recover his purchase price without liability for use, depreciation, damage, or other diminution in value.). The strength of this example is, of course, tempered by the common requirement that children return all benefits received from a contract and the frequent requirement that the child also pay the obligee for any depreciation of the value of the item.

67. Most jurisdictions still allow children to disaffirm if they have misrepresented their age. But equitable principles like estoppel are more frequently being applied to enforce the contract when the adult party reasonably relied on the child's misrepresentation, such as when the youth appeared to be an adult or was engaged in the business like an adult. DiMatteo, *supra* note 11, at 496–97. Additionally, some states have statutes providing that minors may not disaffirm if they have willfully misrepresented their age. See, e.g., MICH. COMP. LAWS § 600.1403 (1996) (forbidding person under eighteen from disaffirming contract if the person willfully misrepresented his age for the purpose of securing the goods or loan of money, and if the seller had no actual knowledge of the minor's true age).

68. Online contracts make reliance on external indicators of age extremely difficult, if not impossible, because “[e]lectronic contracts may never appear on a piece of paper, may involve instantaneous transactions, may involve minimal or no negotiation or interaction, and may involve no human interaction at all.” Donnie L. Kidd & William H. Daughtrey, Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 RUTGERS COMPUTER & TECH. L.J. 215, 239 (2000).

ningless, courts can properly use these exceptions to ensure equitable results for adults who deal with minors. Courts can continue to adapt the idea of what constitutes a necessary and what constitutes a retained benefit in a manner that provides ample security to adults, while continuing to protect minors.

Many of the arguments against retaining the infancy defense fail to consider the practical reality of the unlevel playing field between children and major corporations. While predictions that minors will use the doctrine as a weapon to take advantage of adults may strike a chord with those who already maintain a healthy distrust of America's youth, these predictions should be put into perspective. It is true that teens are a large part of the consumer population, spending billions of dollars annually.⁶⁹ But these teens, cunning as they may be, are up against the likes of Fortune 500 companies that spend billions of dollars annually on marketing efforts aimed at children.⁷⁰ The true concern should be for children, who most likely are unaware of their legal rights under the infancy law doctrine and are dealing with large corporations with far greater bargaining power.

Even if the infancy law doctrine was used as the proverbial sword—by that rare teenager who is even aware that such a doctrine exists—to harm the unsuspecting businessman, equitable relief is available. Although absolute age verification may be impossible, a requirement that users assert that they are of age, in conjunction with sophisticated behavior by the minor, may suffice to support a claim that the adult's reliance was reasonable and would be sufficient to cause a court to intervene. Decades of worrying about inequitable results for adults have worn some large holes in the fabric of the infancy law doctrine,⁷¹ and courts are prepared to step in on behalf of the aggrieved and misled adult. If the doctrine disappears, however, it is unclear who will step in when powerful corporations take advantage of their hold on youth culture and hook children into unwise bargains.

B. Bright-Line Rules Exist in Other Areas of Law and Are Not Inherently Suspect

In addition to sufficiently protecting the interests of adults, the infancy defense maintains its utility as a line-drawing mechanism, even though it functions as a bright-line rule in the midst of a complicated area of law. Bright-line rules, such as age of consent, can always be criticized

69. *New Book Helps Marketers in "Getting Wiser to Teens," supra note 1.*

70. *New Book Helps Marketers in "Getting Wiser to Teens," supra note 1.*

71. *See Part II, supra, for a discussion of exceptions to the infancy defense.*

as arbitrary;⁷² however, these and other distinctions must be and are made in numerous areas of law.

Although bright-line rules can lead to undesirable results, they also provide benefits that outweigh their harms. Critics of the infancy defense decry the idea of a rule under which a party is completely incapable of consent one day, then magically gains competence on the next.⁷³ Nevertheless, there are numerous examples of bright-line rules regarding juveniles. For instance, the country is satisfied with the same bright-line principles applying to driving, drinking, and sex. Furthermore, legal history is replete with examples of apparently arbitrary line drawing because drawing the line at a particular age provides certainty and administrative efficiency. For an overburdened justice system, a doctrine that draws a line at the eighteenth birthday is superior to one that requires an in-depth review of every individual minor's cognitive capacity. Not only does this sort of line drawing further judicial economy, but it also enhances predictability: companies will know what the likely results are when they transact with minors. Therefore, the argument that age is an arbitrary distinction cannot support the eradication of the infancy defense.

C. Preserving the Infancy Defense Does Not Encourage Immoral Behavior Among Children

Concern for the moral integrity of America's youth is also an un-persuasive reason for eliminating the infancy defense. The infancy defense does not promote irresponsible conduct, as some claim.⁷⁴ Critics argue that a doctrine that allows a child to knowingly enter a contract and then later disaffirm it without consequences contributes to the corruption of the minor, encouraging him to shirk responsibility and take advantage of adults.⁷⁵ But the elimination of the defense jeopardizes children more

72. DiMatteo, *supra* note 11, at 494 (“[T]he age of majority is simply an arbitrary dividing line between infancy and adulthood. Furthermore, this dividing line is more a product of historical whim than based upon any meaningful distinction.”).

73. Daniel, *supra* note 12, at 256 (“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.”). Critics also contend that if the age of capacity can be an individualized inquiry, leading criminal courts to hold juveniles accountable as adults in certain situations and holding minors liable for their torts, there should not be a bright-line rule for contracts. DiMatteo, *supra* note 11, at 494 (“It seems anomalous . . . that youths of sufficient age and capacity . . . may be convicted of crime, and be held liable for their torts, and yet not be liable on their contracts when apparently of sufficient capacity to make them . . .” (citing *La Rosa v. Nichols*, 105 A. 201, 203 (N.J. 1918)).

74. Daniel, *supra* note 12, at 257 (“More than anything, the current doctrine appears to provide conniving adolescents with a free pass, effectively discouraging any sense of accountability.”).

75. Dodson *ex rel.* Dodson v. Shrader, 824 S.W.2d 545, 550 (Tenn. 1992) (“[The infancy law doctrine] does not appear consistent with practice of proper moral influence upon young people, tend to encourage honesty and integrity, or lead them to a good and useful business future, if they are

than the retention of the defense, as eliminating the defense will result in unwitting children being subjected to manipulation by corporations. Additionally, even if a child is able to renege on a deal, the non-legal consequences may be enough to deter such conduct.

Parents are better sources for moral teaching than contract law. It is incongruous to both take a paternalistic approach, purporting to protect children's morals, and simultaneously insist that children be independent economic actors, capable of entering into contracts without parental consent. This is especially true when the result of this effort is to make children more susceptible to the efforts of companies that seek to encourage unhealthy lifestyles.⁷⁶ Permitting children to avoid their contracts may do less to degrade their morals than allowing them to freely enter contracts with credit card companies and spend money they do not have.

Those who would abolish the infancy defense on moral grounds also overlook the fact that a release of legal liability is not a release from all consequences. Even if a minor is able to employ the infancy defense and disaffirm, this determination will be made after at least some degree of legal battle and will likely involve a return of any benefit received. Although the minor may not remain financially or otherwise bound by the agreement, the complex and negative legal experience would likely deter the minor from breaking any of his future commitments. The link between the infancy defense and the alleged moral degeneration of America's youth is tenuous at best.

The infancy defense has been subject to many unfounded and unfair critiques. It is charged with affording children under the age of eighteen an unfair advantage, even though the doctrine is worn thin with equitable exceptions to protect adults. It is accused of being an exercise in arbitrary line drawing despite the fact that imposing age restrictions on children is common enough to have become mundane. Worst of all, it is described as contributing to the moral degradation of youth, despite the fact that it is one of the few doctrines keeping children under the economic supervision and care of their parents and away from the large companies drawn to the aroma of their pocket money. The infancy defense should not be abolished; instead, it should remain in place as a protection for children who enter improvident contracts.

taught that they can make purchases with their own money, for their own benefit, and after paying for them, and using them until they are worn out and destroyed, go back and compel the vendor to return to them what they have paid upon the purchase price. Such a doctrine can only lead to the corruption of principles and encourage young people in habits of trickery and dishonesty.”)

76. See *infra* Part V.B for a related discussion on the trend of credit-card use among teens and young adults.

V. WHY THE INFANCY DEFENSE IS STILL RELEVANT AND NECESSARY IN THE MODERN MARKETPLACE

Despite its age, the infancy defense remains relevant in modern society for many reasons. First, children's digital and technological aptitude does not make them as cognitively developed as adults. Second, contemporary contract formation practices, such as form contracts that provide no opportunity to bargain and hidden agreements that can be accepted without a conspicuous manifestation of assent, belie a claim that even an advanced child is competent to contract. Third, inequity in bargaining power is very powerful in contracts with minors because young people are intensely targeted by large companies that carefully advertise products to appeal to them. Finally, the issue of retaining the infancy defense is part of a larger struggle to protect America's youth from furthering what has become a harmful cycle of consumerism and debt.

A. Minors Need Protection Because They Are Not Cognitively Capable of Consenting to Transactions in the Modern Marketplace

Children continue to require protection in the modern marketplace in part because of the reason they required protection through the infancy defense in the first place: children are cognitively inferior to adults. A common argument against the retention of the infancy defense is that minors have the cognitive capacity to make contracts.⁷⁷ Data suggest that minors have adult levels of cognitive functioning once they reach fourteen years of age,⁷⁸ and it has been argued that minors become rational consumers well before reaching the age of eighteen.⁷⁹ But these studies are not conclusive; there is also evidence that children are more impulsive than adults and lack the foresight necessary to evaluate the pros and cons of entering into a binding agreement.⁸⁰ An important dif-

77. Daniel, *supra* note 12, at 252 ("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.").

78. CHILDREN'S COMPETENCE TO CONSENT 245 (Gary B. Melton, Gerald P. Koocher & Michael J. Saks eds., 1983).

79. Daniel, *supra* note 12, at 267.

80. Catherine Sebastian, *The Second Decade: What Can We Do About the Adolescent Brain?* 2, 4 (2007), available at <http://eprints.ucl.ac.uk/3330/> ("For example, teenagers have no trouble making the complex but automatic visual calculations necessary to work out when an approaching car will reach their location. However, a teenager may decide that they have time to cross the road before it gets there, whereas an adult might decide to play it safe and wait. This is of course a generalisation, but it illustrates that the most profound differences between adults and adolescents occur at the decision-making, or executive, levels of processing. . . . [F]indings from studies of risk-taking behaviour in the real world . . . [show] that adolescents are more likely than adults to engage in risky activities such as unprotected sex, reckless driving, and experimentation with drugs. If, as the results

ference between adults and children lies at the decision making, or executive, level of processing.⁸¹ Even if children's brains are fully developed before they reach age eighteen, they are still immature about decision making, which matters most for the purposes of the infancy defense: They are impulsive risk takers. Furthermore, even those children who are especially advanced do not necessarily understand the realm of contracts as well as adults and cannot weigh the costs and benefits associated with a complicated transaction.

Cognitive function also does not equate to market sensibility for the purpose of contract formation. Critics argue that minors' technological savviness corresponds to a higher degree of sophistication and capacity to contract, particularly online, as children have been exposed to digital technology from an early age.⁸² Technological wherewithal, however, has little to do with an understanding of the cost-benefit analysis that adults employ when making a decision. The problem is too complex to reduce to a statement that children are capable of consent at a certain age.⁸³ The legal system's apparent difficulty creating clear delineations of age-related maturity levels illustrates that one cannot so simply claim that minors are generally capable of contracting like adults without regard to the nature of the contract at issue.⁸⁴ The nature of the contract is imperative to determining contract capacity because the risk-assessment abilities that are critical for decision making are the areas where children and teens are most lacking. This lack of risk-assessment ability is particularly problematic due to the types of contracts that proliferate the Internet.

The nature of online contract formation makes it difficult for consumers to make informed decisions, regardless of their ages. Even adults

suggest, young people are less good at anticipating the outcome of events, perhaps they are unable to accurately appraise the risk levels when faced with a real-life choice.”).

81. *Id.*

82. Daniel, *supra* note 12, at 267.

83. Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 151 (2003).

A body of research examining the relative decision-making capacities of adolescents and adults has emerged in recent years. This work does not provide simple or conclusive answers to the question of whether adolescent decision-making fits comfortably into predictive categories. Nor does it draw bright-line, age-determined dividing lines between adolescence and adulthood. Instead, this research suggests that cognitive and social development occurs unevenly within and among individuals. More importantly, this research challenges the claim that adolescents are fully responsible for the decisions that they make.

Id.

84. Megan E. Hay, Note, *Incremental Independence: Conforming the Law to the Process of Adolescence*, 15 WM. & MARY J. WOMEN & L. 663, 665 (describing the inconsistencies in treatment of minors across legal areas leading to a legal “hodge-podge” of laws affecting adolescents).

have greater chances of getting swindled when they have no opportunity to bargain and do not take the time to read the terms and provisions of a contract. To the modern consumer, notions of offer and acceptance, negotiation, and even signing a literal document after reading its terms seem like quaint customs from a former age. Modern contracts, particularly when they are formed over the Internet, lack such formalities. Citing convenience and decreased costs, companies are permitted to use form contracts offered to users on a take-it-or-leave-it basis, even if the terms were not disclosed until after the consumer had already agreed to the transaction.⁸⁵ Courts have enforced license agreements when the consumer clicked "I Accept," despite the consumer's attempt to bargain for certain terms.⁸⁶ In the current state of the law, even conduct less clearly manifesting assent, like merely browsing a website, can be sufficient to form a contract.⁸⁷ Although these evolving practices have been limited by courts that require that the individual accepting the offer be at least aware that there is an offer bound up in the website,⁸⁸ the problem remains that contracts arise with little to no affirmative manifestation of assent and contain almost entirely unbargained-for terms.

This lack of affirmative consent and inability to bargain for terms in a modern contract makes the marketplace perilous for minors. Even if it were true that children are, in large part, capable of reaching a meeting of the minds and, therefore, competent to consent, this reasoning does not extend to the type of competence modern contracts anticipate. Not only is this claim inapplicable to a group as diverse as minors and to an act as broad as contract formation,⁸⁹ but also the nature of the reasoning involved in accepting an online adhesion contract requires more than basic competency. Recognizing that rational choices are not always behind consumers' decisions in the marketplace,⁹⁰ one author argues that a minor should still be accountable for a contract accepted without an understanding and rational evaluation of the terms because by blindly binding himself, a child is simply mirroring the conduct of a normal adult con-

85. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

86. *i.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002).

87. *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000) (introducing the term "browsewrap" to mean an agreement formed by the conduct of a visitor to a website).

88. ONLINE CONTRACT FORMATION, *supra* note 8, at 330–31.

89. Taylor-Thompson, *supra* note 83, at 151–52. "[M]ost psychologists conclude that cognitive ability alone does not define or determine an individual's decision-making capability. Personal and environmental factors operate to influence an individual's ability to make mature judgments. Factors such as uncertainty, stress, and cultural experiences may differentially enhance or impede decision-making capacity." *Id.*

90. Daniel, *supra* note 12, at 250–51.

sumer.⁹¹ In the modern age, it is a “rational consumer act” to place voluntary limits on one’s own cognition.⁹² In a typical situation involving an online adhesion contract with a clickwrap agreement, the adult 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.”⁹³ The decision to cross one’s fingers in a surge of optimism rather than take the time to read pages of fine-print legalese (a particularly compelling urge in the venue of the Internet, that arena of speedy transactions and instant gratification) is a new brand of rationality. Such a decision, while acceptable for adults with years of experience with common contract provisions and of risk assessment, is not plausible for naive consumers like minors.

Minors’ technological wherewithal does not equate to a significant awareness of what contract terms are standard and fair and which are outrageous. People are not born with financial literacy.⁹⁴ They lack an innate understanding of interest rates, overdraft and late charges, and building a good credit score. They are not aware of mandatory arbitration provisions, terms prohibiting injunctive relief, or terms asserting jurisdiction. Granted, many adult consumers may not have this awareness either; however, adults are expected to accept the risks of their economic pursuits, to research answers, to consult financial planners, and to otherwise ensure that they are getting a fair deal. Children and teens, on the other hand, are enticed by rewards packages, design elements, celebrity spokespersons, and other media assaults specifically designed around their blossoming interests,⁹⁵ and they can easily fail to weigh the costs and benefits of a transaction. With a parent as a guide and instructor, minors can certainly attain a level of consumer awareness that would

91. *Id.*

92. *Id.*

93. *Id.*

94. Libby Wells, *Card Issuers Target Teens for Latest Plastic Attacks*, BANKRATE.COM, <http://www.bankrate.com/brm/news/cc/20000508.asp> (last visited Apr. 3, 2010) [hereinafter *Plastic Attacks*].

Jump\$tart, a nonprofit organization based in Washington, D.C., says these fresh young things aren’t ready for plastic. Every other year, the group quizzes 12th-graders in public schools around the country on topics such as paying taxes, using credit cards and retirement savings. On average in 2006, participants answered only 52.4 percent of the questions correctly, a failing grade. This was marginally better than the results of the 2004 survey (52.3 percent). The lowest was in 2000, when students scored an average of 50.2 percent.

Id.

95. See generally *About TRU: Overview*, TRU—TEENS, TWEENS, AND TWENTY-SOMETHINGS RESEARCH, http://www.tru-insight.com/about.cfm?page_id=41 (last visited Nov. 8, 2010); SCHOR, *supra* note 2.

constitute capacity to contract. But if parents are not present or do not advise their children prior to the clicking of “I Accept,” children are entering bargains woefully underinformed.⁹⁶ Elimination of the way out for children who unwisely enter into contracts without parental consent puts minors—and their parents, who will, in many cases, acquire their children’s financial obligations—at the mercy of the companies who can afford to attract young consumers.

B. Minors Need Protection Because Their Prominence in the Marketplace Leads Large Companies to Target Them

Minors continue to need protection, despite—or even because of—their marketplace prominence. It is no secret that minors are plugged-in and spending.⁹⁷ They are such voracious consumers that an industry has been born to help companies cater to them.⁹⁸ Companies like TRU specialize in youth markets, and they encourage businesses that wish to deal with minors to use their services in order to “develop meaningful connections with young people.”⁹⁹ TRU’s customers are working to tap the youth market through advertising campaigns and outreach specifically designed to appeal to minors. Catering directly to children’s

96. Numerous sources indicate that children are largely unsupervised while using the Internet, particularly in poor and minority homes. SCHOR, *supra* note 2, at 11. Removing a child’s ability to disaffirm contracts entered into without parental consent would create a risk that children will, in ignorance of the nature or extent of the terms they are accepting, bind themselves to undesirable contracts. This problem is particularly important because of the possibility of parental liability for these contracts. Because children from disadvantaged families are the most likely to be uneducated on finances and to be unmonitored while online, the risk created by removing the infancy defense falls disproportionately on those families least able to absorb the cost.

97. *Plastic Attacks*, *supra* note 94. “Jupiter Communications estimates that teens accounted for \$1.2 billion in Internet spending by 2002.” *Id.*

98. For example, TRU calls itself “the global leader in teens, tweens, and twenty-somethings.” *About TRU: Overview*, TRU-TEENS, TWEENS, AND TWENTY-SOMETHINGS RESEARCH, http://www.tru-insight.com/about.cfm?page_id=41 (last visited Nov. 8, 2010).

99. *Id.* TRU describes itself:

As an advocate for young people, TRU has provided critical direction for many of the nation’s most prominent and successful social-marketing campaigns, helping to keep young people safe and healthy. Our work has made a difference—from being put to use at the grass-roots level to being presented at the very highest levels of government.

Id. Despite this noble claim, TRU’s client list is riddled with the names of retail mega-corporations like Abercrombie & Fitch, Gap, American Eagle, Kmart, Nordstrom, Safeway, Target, and Victoria’s Secret. It also boasts of its service to The Coca-Cola Company, Frito-Lay, Kellogg, Kraft, PepsiCo, every major cell-phone company and sports association, several major auto makers, and disconcertingly, financial businesses like Visa, Discover Card, Allstate Insurance Company, Nationwide Insurance, and Merrill Lynch. *About TRU: Client List*, TRU-TEENS, TWEENS, AND TWENTY-SOMETHINGS RESEARCH, http://www.tru-insight.com/about.cfm?page_id=42 (last visited Nov. 8, 2010).

tastes, corporations lure minors into purchasing adult-type products, then offer unfair contract terms that children are likely to accept.¹⁰⁰

For example, credit card companies like CapitalOne solicit credit card applications from high school juniors and seniors through Internet advertising and mailings addressed to their parents.¹⁰¹ As of now, an application requires a parent signature; however, if the card company did not have the threat of the cardholders asserting the infancy defense, it is debatable that this requirement would remain. With a 19.8% interest rate,¹⁰² credit card companies have a great deal to gain from consumers who have not yet learned fiscal responsibility. As one journalist notes, “Many teens don’t know enough about borrowing to use a credit card, but issuers know a lot about [teens], and they want their business.”¹⁰³ This is just one example of the disparity in bargaining power between youth and large corporations, and the surge of advertising directed toward young people is only increasing the divide.

Although some parent groups oppose youth-targeted advertising, the idea of giving credit cards to children is gaining support. Parents and consumer protection groups have reacted to the dangers of the Internet, providing advice to parents who seek to ensure their children behave responsibly while online and do not get taken advantage of.¹⁰⁴ At the same time, however, sites have cropped up in support of the trend. Credit Card for Kids, an informational credit card site, offers advice to parents select-

100. *Plastic Attacks*, *supra* note 94.

Credit card companies, which keep a hawk’s eye on demographics, are swooping down on young consumers. Initiating the quest for kids under age 18 is Capital One, one of the nation’s leading issuers. The Virginia-based company is targeting high school juniors and seniors with a co-signed MasterCard that is solicited through the Internet and mailings addressed to their parents. The card has a stiff 19.8 percent fixed annual percentage rate and no annual fee The child gets the card—and the bill—in his or her name, but the parents are legally responsible for the account.

Plastic Attacks, *supra* note 94.

101. *Plastic Attacks*, *supra* note 94.

102. *Plastic Attacks*, *supra* note 94.

103. *Plastic Attacks*, *supra* note 94.

104. See, e.g., *Safety Advice and Tools*, SAFEKIDS.COM: ONLINE SAFETY & CIVILITY, <http://www.safekids.com/> (last visited Nov. 8, 2010) (offering advice to parents about how to protect their children online); *Safety Advice and Tips*, CONNECT SAFELY, <http://www.connectsafely.org/> (last visited Nov. 8, 2010) (encouraging safe online practices for children); Françoise Gilbert, *Age Verification as a Shield for Minors on the Internet: A Quixotic Search?*, 5 SHIDLER J. L. COM. & TECH. 6 (2008), available at <http://www.lctjournal.washington.edu/Vol5/a06Gilbert.html> (suggesting that because age verification on the Internet is not technically feasible, parents must prevent their children from going online unsupervised and unprepared); *About CCFC*, CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD, <http://www.commercialexploitation.org/aboutus.htm> (last visited Nov. 6, 2010) (Home page of the Campaign for a Commercial-Free Childhood, an organization whose mission is to “reclaim childhood from corporate marketers.”).

ing their child's first credit card.¹⁰⁵ The site provides recommendations both about what a parent should watch out for when selecting a credit card (the ability to track spending online, discounts, and rewards that are tailored to children),¹⁰⁶ and what brand of card to choose.¹⁰⁷ It ends with the sage advice, "No one *needs* a credit card, but it is good to have it there in case you do."¹⁰⁸ A website such as this provides false comfort—although it purports to help children make rational, adult choices, it is really focused on encouraging parents to take out another credit card on which they will pay interest. The very presence of these sites encourages parents to believe it is appropriate for their children to amass credit card debt before they even finish high school. These practices contribute to an atmosphere of commercialization and consumerism that is detrimental to America's youth.

C. *Minors Need Protection as a Matter of Social Policy*

What sites like Credit Cards for Kids do not address is the potential harm of exposing children to credit and consumerism at such young ages. Credit cards, while certainly prevalent, provide questionable benefits when used widely, particularly when used by the poor or those who do not manage their finances well.¹⁰⁹ Without the infancy defense, minors are able to enter into credit card contracts at younger ages, meaning Americans will get an earlier start at accumulating debt. It is not appropriate to indoctrinate children into a credit cycle that has left millions of Americans with serious debt.¹¹⁰ As of March 2009, the total U.S. consumer debt was \$2.55 trillion.¹¹¹ Of this, revolving debt (or debt from credit cards, as opposed to loans for automobiles, education, etc.) made up \$945.9 billion.¹¹² The average credit card debt per household with

105. CREDIT CARD FOR KIDS, <http://www.creditcardforkids.com> (last visited Apr. 3, 2010) (offers advice "to parents looking for credit cards for kids, teenagers, and college students").

106. *Id.*

107. All featured recommendations are from Citibank. *Id.*

108. *Id.*

109. Mike Konczal, *How Credit Cards Rob the Poor to Spoil the Rich*, THE ATLANTIC, Nov. 24, 2009, http://business.theatlantic.com/2009/11/frontline_special_the_card_game_tonight.php.

110. JOINT ECON. COMM., U.S. CONGRESS, VICIOUS CYCLE: HOW UNFAIR CREDIT CARD PRACTICES ARE SQUEEZING CONSUMERS AND UNDERMINING THE RECOVERY (2009) [hereinafter VICIOUS CYCLE].

111. *Id.* at 4.

112. *Id.* In the fourth quarter of 2008, 13.9% of consumer disposable income went to service this debt. *Id.*

credit debt is \$16,007,¹¹³ and the average cardholder has more than three credit cards.¹¹⁴

According to a report by Congress's Joint Economic Committee, as the economy has weakened, Americans' financial situations have only become worse.¹¹⁵ While the trend of credit cards among young people is rather new, the results in that arena are similarly disheartening, as large percentages of people under twenty-five are already saddled with significant debt.¹¹⁶ The alarming figures above represent the consumer debt amassed when only approximately 60% of consumers report having a credit card.¹¹⁷ Recent reports show that approximately 84% of the overall student population has credit cards,¹¹⁸ and half of college undergraduates have four or more.¹¹⁹ Without the infancy defense preventing people under eighteen from forming contracts with credit card companies, the outlook is bleak.

The increase in consumerism and credit card use among young people has negatively impacted young adults and will likely further impact the futures of today's children. As one public policy research organization declares, "Debt has become a generation-defining characteristic of today's young adults."¹²⁰ The financial circumstances of these young adults are very different than for the same age group in previous generations.¹²¹ On the whole, young adults today are spending an alar-

113. Ben Woolsey & Matt Schulz, *Credit Card Statistics, Industry Facts, Debt Statistics*, CREDITCARDS.COM, <http://www.creditcards.com/credit-card-news/credit-card-industry-facts-personal-debt-statistics-1276.php> (last visited Apr. 4, 2010).

114. *Id.*

115. VICIOUS CYCLE, *supra* note 110, at 2 ("As household wealth has declined in the downturn, more American families are facing financial distress due to high debt burdens. In 2007, before the recession began, 14.7 percent of U.S. families had debt exceeding 40 percent of their income.")

116. TAMARA DRAUT, *ECONOMIC STATE OF YOUNG AMERICA* (Spring 2008), available at http://www.demos.org/pubs/esya_web.pdf. The average college graduate has nearly \$20,000 in debt. Though student loan debt accounts for a great deal of this amount, the average credit card debt has increased 47% between 1989 and 2004 for twenty-five to thirty-four-year-olds and 11% for eighteen to twenty-four-year-olds. Nearly one in five eighteen to twenty-four-year-old is in "debt hardship," up from 12% in 1989. Student loan debt, also higher and dramatically more common in this generation, furthers credit card debt problems. Today's twenty- and thirty-somethings are relying more on credit cards to cover basic living expenses. *Id.* at 13.

117. Woolsey & Schulz, *supra* note 113.

118. Woolsey & Schulz, *supra* note 113.

119. *Id.* Only 17% of surveyed college students said they regularly paid off all cards each month, and another 1% had parents, a spouse, or other family members paying the bill. The remaining 82% carried balances and, thus, incurred finance charges each month. *Id.*

120. DEMOS.ORG: A NETWORK FOR IDEAS AND ACTION, *GENERATION DEBT: STUDENT LOANS, CREDIT CARDS, AND THEIR CONSEQUENCES 2* (Winter 2007), available at http://www.demos.org/pubs/yaes_web_debt.pdf.

121. *Id.* at 3. Young Americans now have the second highest rate of bankruptcy, just after those aged thirty-five to forty-four. The rate among twenty-five to thirty-four-year-olds increased

mingly large portion of their incomes on debt.¹²² If people in their mid-twenties are so much worse off than the members of the Baby Boomer generation were at the same age, imagine how today's young children will fare when they reach young adulthood. At younger and younger ages,¹²³ children are drawn in to an earn-and-spend economic lifestyle, in which the attainment of material possessions is the most important indicator of success.¹²⁴ While most minors spend their money on food, clothing, and entertainment, larger purchases are occurring with greater frequency.¹²⁵ The prospect of large purchases, which means greater financial obligations and longer-term commitments, shows a greater need to ensure that minors are well-informed and capable of consenting before they are held to their contracts.

The infancy defense plays an important role in protecting children because it is difficult for parents to monitor their children's consumer behavior. Although numerous filters exist and are used to block certain content from kids,¹²⁶ it remains difficult for parents to truly control their children's Internet use, and both parents and teens agree that teens often behave unwisely on the Internet.¹²⁷ This tendency, in combination with

between 1991 and 2001, indicating that this generation is more likely to file bankruptcy as young adults than when young boomers were the same age. *Id.* at 4.

122. *Id.*

The rise in credit card debt, coupled with the surge in student loan debt, is the main reason why today's young adults are spending much more on debt payments than the previous generation. On average, 25-to-34-year-olds spend nearly 25 cents out of every dollar of income on debt payments, according to the Federal Reserve's data. That's more than double what Baby Boomers of the same age spent on debt payments in 1989. The fact that young adults are already spending a quarter of their income on debt is particularly worrisome because most in the 25 to 34 age group aren't homeowners. So that 25 cents is going to nonmortgage debt: primarily student loans, car loans, and credit cards.

Id.

123. SCHOR, *supra* note 2.

124. SCHOR, *supra* note 2.

125. Katharine Tengio, *Teens as Major Consumers?*, WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL, Aug. 1, 2008, <http://www.atg.wa.gov/BlogPost.aspx?id=20570#>. Although teens are saving, teens are also avidly spending. Generally, most of their money goes towards clothes, MP3 players, athletic equipment, and cell phones. On a more expensive scale though, teens are also buying cars for the first time, purchasing laptops for school, opening their first bank accounts, renting an apartment for the first time, and obtaining new credit cards. *Id.*

126. Amanda Lenhart, *Protecting Teens Online*, PEW INTERNET & AMERICAN LIFE PROJECT, 2 (Mar. 17, 2005) http://www.pewinternet.org/~media/Files/Reports/2005/PIP_Filters_Report.pdf.

[T]he use of filters has grown significantly in internet-using households with minor teenagers More than half (54%) of internet-connected families with teens now use filters Given the overall growth in the internet-using population of teenagers, this means that the use of filters in families with teens has grown 65% in four years, from around 7 million users at the end of 2000, to close to 12 million today.

Id. at 2.

127. *Id.* at 3. According to a 2004 study of twelve to seventeen-year-olds and their parents, 81% of parents of online teens say that teens are not careful enough when giving out information

the fact that most online behavior is unsupervised, poses a real risk that minors will agree to unfair bargains. The risk of minors agreeing to unfair bargains is exacerbated by the more-than-arm's-length nature of contracts that are typical online, such as adhesion contracts in the form of clickwrap agreements, as the contract terms are not obvious. Without anyone to watch over their online activities, minors need some form of protection when they enter into unwise contracts. The infancy defense provides this protection.

The infancy defense may be an old doctrine, but it is important to retain it in modern society. Children are growing up in a world where they are statistically likely to spend their entire adult lives attempting to get out of debt. They are captive audiences, sitting unsupervised in front of computer screens, and large companies have spent a great deal of money on an onslaught of advertising designed to appeal to them. Children sit confidently in front of these screens, perhaps more confidently than their grandparents or parents; however, even intelligent and mature minors do not know how to deal with common practices in contract formation. They are not experienced enough, and their brains are not developed enough, to recognize which risks are worth taking. These children could be accepting offers for credit cards with pictures of innocuous Disney characters while being unaware that they are being charged interest rates over 20%. Without the infancy defense protecting minors, there will be little reason for corporate restraint.

VI. CONCLUSION

Because the infancy defense protects youth in the face of commercialization and unfair bargaining power, courts should continue to recognize it. America's youth are subject to a tremendous amount of targeted advertising, and they are growing into an extremely materialistic, brand-oriented generation. The level of consumerism at young ages that exists in society currently is unprecedented, meaning children are easier to draw in. Additionally, the amount of bargaining power held by the average consumer is at an all-time low, and even large contracts are entered into without negotiation. This problem is magnified when the consumer is a minor because children have not developed the cognitive capacity necessary to contract in the modern marketplace.

The infancy defense is not perfect, but the arguments against it are unpersuasive. There are already significant protections for adults who deal with minors through the common exceptions to the infancy law doc-

about themselves online; 79% of online teens agree that teens are not careful enough when sharing personal information online; and 65% of all parents and 64% of all teens say that teens do things online that they would not want their parents to know about. *Id.* at 3.

trine. Removing the infancy defense could lead corporations to abandon any restraint they exercise in targeting minors. Without the threat of disaffirmance, there is little reason not to entice minors into contracts that are not in their best interests. These contracts will result not only in short-term difficulties for those children and their parents, but also, on a larger scale, will contribute to tremendous consumer debt and the propagation of harmful financial practices for an entire generation.