# THE INFANCY DOCTRINE: AN EPIC DEPARTURE

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## I. INTRODUCTION

Today's children are subjected to new and evolving dangers due to the efforts of video game developers' objectives to grow their businesses by attracting minors to play their games. Minors—both small children and mature adolescents—are increasingly involved in online activities that generate profits for various corporations, including online video game developers. Commentators agree: "A significant implication of this revolution is a dramatic rise in the use of online [services] by minors."[1] A recent study shows that approximately 95% of minors, ages twelve to seventeen, were online in 2018, with 88% of minors having access to a desktop or laptop computer, and 95% of teens having access to a smartphone.[2] Forty-five percent of teens also say that they use the internet almost constantly, which is nearly double the amount using the internet constantly in 2014–2015.[3] In addition, 84% of teens say they have access to a video game console at home, and 90% say they play video games.[4]

The increasing dangers bombarding minors originates from the common law evolution—or more accurately stated, the common law restrictions—of the infancy doctrine,[5] and the ever-increasing internet and video game usage by minors. In an effort to make technology more affordable and efficient, corporations that utilize the internet as part of their business, including video game developers, have drafted and inserted different types of online contracts that mandate user agreement in order for the user to utilize the website or video game.[6] These online contracts include End User License Agreements (EULA) and Terms of Service (TOS).[7] EULAs and TOS are generally found enforceable as a matter of contract law.[8] Courts have reasoned that the enforceability of these agreements is essential to an efficiently functioning market or economy.[9] The real issue becomes: Are courts willing to bankrupt thousands of families across the United States in an effort to make the economy more efficient? Because although those agreements may lead to a more efficient market or economy, the agreements have come under much scrutiny recently by scholars who point out that EULA and TOS agreements are almost never read, comprehended, or negotiated, and frequently invoke

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1. *See* Megan Diffenderfer, *The Rights of Privacy and Publicity for Minors Online: Protecting the Privilege of Disaffirmance in the Digital*, 54 U. LOUISVILLE L. REV. 131, 131 (2016).

2. Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RES. CTR. (May 31, 2018), http://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/.

3. *Id.*

4. *Id.*

5. *See* RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:2 (4th ed. 2010).

6. Oliver Herzfeld, *Are Website Terms of Use Enforceable?*, FORBES (Jan. 22, 2013, 9:11 AM), https://www.forbes.com/sites/oliverherzfeld/2013/01/22/are-website-terms-of-use-enforceable/#1e613d73f4a7.

7. *Id.*

8. *See generally* Cheryl B. Preston, *CyberInfants*, 39 PEPP. L. REV. 225 (2012).

9. *See id.* at 272; *see, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996).

very little evidence of assent.[10] One of the most important considerations when entering into a contract—whether online or on paper—is understanding the rights, obligations, and liabilities of the contract.

Minors' increasing presence online have resulted in numerous legal controversies relating to minors' online transactions and minors' rights under the infancy doctrine to disaffirm their online contracts.[11] A new legal controversy includes contract disputes between minors and video game developers. As this Comment will highlight, video game developers are operating with the viewpoint that minors should be held contractually liable in the same manner as adults, which is exactly what the infancy doctrine proscribes.[12] Despite the developers' attempts to overlook the legal protections afforded to minors courtesy of the infancy doctrine, "the infancy doctrine is the law, and it is one mechanism for encouraging [game developers] to reign in their greed both in targeting children and in catching all users with hidden, overreaching contract terms."[13]

The goal of this Comment will serve four main purposes. First, it will explore the development of video games in recent years and discuss the impact that these new types of video games (known as free-to-play games) have on contract law and minors.[14] This exploration will include a deep dive into a recent case that is pending in a North Carolina district court.[15] In that case, Epic Games is suing a minor for breaching the terms of Epic's online contract.[16] Epic Games is a large video game developer that created the game Fortnite.[17] The case is critical to this Comment because this is the first time a video game developer has sued a minor for copyright infringement and breach of contract claims seeking monetary damages in lieu of an injunction preventing the minor from any future game play.[18]

Second, this Comment will explain the two types of typical online contracts—known by some as online contracts of adhesion[19]—that must be agreed to by all players in order to access these online, virtual game worlds. These are not the typical contracts one thinks of in which both parties review the terms and conditions to reach a mutual agreement. Instead, these contracts

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10. *See infra* Part V.B (explaining that both adults and minors are unaware of the contract's rights, obligations, and consequences they are agreeing to when entering into online contracts).

11. *See infra* Part III.C (discussing the ways in which courts are limiting a minor's right to disaffirm a contract).

12. *See* Preston, *supra* note 8, at 228.

13. *Id.*

14. *See infra* Part II.B (highlighting the issues with free-to-play games).

15. *See* Epic Games, Inc. v. Rogers, No. 5:17-CV-00534 (E.D. N.C. filed Oct. 23, 2017).

16. *Id.*

17. *Id.*

18. *Id.*; Nick Statt, *Epic Games Receives Scathing Legal Rebuke from 14-Year Old Fortnite Cheater's Mom*, VERGE (Nov. 27, 2017, 7:37 PM), https://www.theverge.com/2017/11/27/16707562/epic-games-fortnite-cheating-lawsuit-debate-14-year-old-kid.

19. *See generally* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983).

provide the consumer-contracting party with no option but to accept the game developer's contract terms, refusing to allow access without the user clicking "accept."[20] Some courts throughout the United States are beginning to take the player's side in saying that those types of contracts are truly contracts of adhesion.[21] However, the problem is that only a minority of courts are taking the players' side while the majority of courts consider these online contracts fully enforceable.[22] After providing a brief overview into these types of contracts, this Comment will then include a discussion about the applicability and problems with the ability of minors to disaffirm these online agreements.[23]

Third, this Comment will discuss relevant case law exhibiting courts' shifting dynamics from allowing minors to disaffirm most contracts to the modern viewpoint of expanding the defenses adults can claim against the infancy doctrine.[24] Most importantly, the retained benefits defense acts as a severe restriction on minors' rights to disaffirm contracts.[25] Although caselaw will be discussed from multiple states, this Comment will focus on Texas case law and the potential effect of other states' case law on Texas's current interpretation of the infancy doctrine.[26]

This Section will also highlight the important societal views of online contracts and minors.[27] Many scholars believe that minors should be held liable under contract law in the same manner and to the same degree as adults because the minors "willingly" entered into these contracts.[28] Besides the obvious fact that these online contracts are typically contracts of adhesion, studies and scholarly articles note that although minors may "consent" to the terms and conditions of the online contracts, minors do not possess the requisite cognitive abilities to understand what these contract terms mean or what the potential liabilities from a contract breach would entail.[29]

Lastly, this Comment will highlight the current, unsettled, and problematic issue of the further restriction on minors' right to disaffirm

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20. Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 606 (E.D. Pa. 2007).

21. *See id.* (reasoning that the TOS of the game developer was a contract of adhesion because the TOS was presented on a take-it-or-leave-it basis, so a potential participant can either click "assent" to the TOS, and then gain entrance to the game's virtual world or be denied access to the game); McKee v. AT&T Corp., 191 P.3d 845, 857–59 (Wash. 2008) (reasoning that a TOS with an arbitration clause was a contract of adhesion).

22. Preston, *supra* note 8, at 227.

23. *See infra* Part III.A (exploring the infancy doctrine and its effect on minors).

24. *See infra* Part III.B–C (addressing the expansion of the retained benefits defense).

25. *See infra* Part III.B (explaining the retained benefits defense).

26. *See infra* Part III.C (highlighting Texas's interpretation of the infancy doctrine).

27. *See infra* Part V (discussing different views on minors' understanding of contract law).

28. *See infra* Part V.A (explaining that critics argue minors possess equal cognitive decision-making abilities as adults and should be held contractually liable in the same manner as adults to prevent minors from taking advantage of adults).

29. *See infra* Part V.B (explaining that no one is born with financial or contract law literacy, so minors are unaware of the rights, obligations, and liabilities they have agreed to when entering into online contracts).

online agreements that waive their rights, and it will offer three resolutions as a means to further protect minors' rights from contractual liability in the modern age of technology.[30] Specifically, this Comment: (1) argues that Texas should follow a recent decision by a Texas appellate court that aligns with the historical and overall purpose of the infancy doctrine; (2) argues that if Texas does end up enforcing these agreements against minors, the only relief that should be permitted is injunctive relief; and (3) proposes a new statute to be passed by the Texas Legislature that spells out minors' rights to disaffirm contracts involving both tangible and intangible goods or property.[31]

## II. EVOLUTION OF THE VIDEO GAME INDUSTRY

To fully comprehend the potentially heinous impact on minors' rights in this Comment, it is necessary to give a brief history of the video game industry to highlight the number of people—minors specifically—that would be affected by the issues brought to light. This Section will discuss different models of video games and Epic Games's record-breaking game Fortnite, and it will highlight a major case regarding liability for a breach of contract when an online contract provided by Epic Games was agreed to and breached by a minor due to the minor's unfair game play.

### *A. Free Games are Better, Right?*

The video game industry has undergone significant changes in the last sixty years.[32] One of the most dramatic changes has been the transformation of the video game console.[33] Consoles used to require each consumer to buy a physical copy of the video game and insert the game into the console in order to play.[34] However, most video game consoles on the market today allow players to connect to virtual worlds by purchasing and using the game through an online medium.[35] There are two basic types of online games that contain internet-accessible virtual worlds.[36] The first type of virtual world requires a monthly-paid subscription in order to access the online game

30. *See infra* Part VII (proposing solutions to help fix the infancy doctrine).

31. *See infra* Part VII (proposing solutions to help fix the infancy doctrine).

32. *See generally* Riad Chikhani, *The History of Gaming: An Evolving Community*, TECH CRUNCH (Oct. 31, 2015), https://techcrunch.com/2015/10/31/the-history-of-gaming-an-evolving-community/ (providing a historical background of the evolution of the video game industry from the mid-1950s to present day).

33. *Id.*

34. *Id.*

35. James Chang & Farnaz Alemi, *Gaming the System: A Critique of Minors' Privilege to Disaffirm Online Contracts*, 2 U.C. IRVINE L. REV. 627, 639–40 (2012).

36. *Id.* at 639.

content.[37] Alternatively, the second type of virtual world uses a micro-payment model in which there is no charge to play the game, but rather the players purchase content or virtual goods such as weapons, virtual currency, clothes, or household items within the game itself.[38] These micro-payment model games are sometimes referred to as a freemium or free-to-play model games.[39] An important note is that these in-game purchases using the micro-payment model require real money to buy virtual property.[40] In a typical scenario, the minor's parents would be liable for any in-game purchases made even if the parents are not aware the game had the option to make in-game purchases, because the minor used his or her parent's credit card to make the purchase.[41] The question becomes: Who is contractually liable when the minor acquires the virtual property without actually paying for it?

Free-to-play games represent a breeding ground for litigation due to the problems encountered with video games and minors.[42] Many of the games do not require players to be a certain age to play, nor do they prohibit any sort of in-game purchases by players less than a minimum age—such as eighteen years old.[43] Anyone of whatever age that desires to play the game can do so as long as they contractually agree to the terms and conditions of the online contracts.[44] Thus, while parents would normally have the ultimate liability when it comes to in-game purchases made from their credit cards, parents are not liable for the actions of their children using cheat codes in games because no actual purchase transaction has taken place.[45] Quite possibly, the only person that has assented to the terms and conditions of the video game by either clicking "agree" or simply playing the game may be a minor who is only fourteen years old.[46]

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37. *See id.*

38. *See id.*

39. *See id.*

40. *Id.*

41. Hussein Kesvani, *The Concerned Parents of Fortnite Addicts*, MEL (June 1, 2018), https://melmagazine.com/en-us/story/the-concerned-parents-of-fortnite-addicts (explaining that a mother was aware her fifteen-year-old son was playing a video game but did not know which game her son was playing, how the game was played, or that her son could make in-game purchases).

42. *See* Matthew Field, *Fortnite and the Dark Side of Video Game Cheating*, TELEGRAPH (May 7, 2018, 8:05 AM), https://www.telegraph.co.uk/technology/2018/05/07/not-childs-play-dark-side-video-game-cheating/.

43. *See Create Account*, EPIC GAMES, https://accounts.epicgames.com/register/customized?ProductName=fortnite&redirectUrl=https%3A%2F%2Fwww.epicgames.com%2Ffortnite%2F&client_id=cd2b7c19c9734a2ab98dc251868d7724&noHostRedirect=true (last visited Nov. 8, 2019) (showing that all that is required to create a Fortnite account is a first and last name, username, email, password, and mandatory agreement with Epic Games's EULA and TOS).

44. *See infra* Part IV (explaining that users "agree" to the terms and conditions in an online contract by clicking "agree" to the online contract).

45. Timothy Geigher, *Epic Sues 14 Year Old It Accuses of Cheating in Videogame After He Counternotices a DMCA on His YouTube Video*, TECH DIRT (Dec. 1, 2017), https://www.techdirt.com/articles/20171127/14360838686/.

46. *See infra* Part IV (discussing enforceability of contracts with minors).

### *B. Modifications that Create Unfair Advantages in Free-to-Play Games*

A new wrinkle has been introduced in the realm of virtual video game worlds that has increased the amount of litigation between developers and players.[47] Many players have developed game modifications—better known as cheat codes—to the game's software that allow the players to achieve a competitive or unfair advantage compared to other players.[48] These game modifications provide players with a competitive advantage by allowing them to acquire virtual property for free while other players must pay to get the same virtual property.[49] Theoretically, the cheat codes can have a detrimental effect not only on other players of the game, but also on the video game developer.[50]

Cheat codes have not always been historically condemned. While most condemn the use of cheat codes in video games, others have supported cheating, claiming that video game cheating used to be part of the fun of games.[51] In the past, cheat codes did not play such an integral part in the generation of revenue for game developers.[52] As the gaming industry has grown and technology has advanced with the introduction of free-to-play games to the video game market, cheat codes have become a larger problem for game developers.[53]

Due to the developer's investments at stake, video game cheating has now become a potential breeding ground for lawsuits.[54] The rationale behind game developers resorting to legal action seems practical enough; they have spent large sums of money to create and update the game, so they want to see a return on their investment in the form of in-game purchases.[55] The steps taken by video game developers to protect their investments have now gone too far.[56] For example, the case discussed later in this Comment shows just how far a video game developer is willing to go to protect their investment.[57]

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47. *See* Field, *supra* note 42.

48. *See generally* Feross Aboukhadijeh, *Cheating in Video Games*, FEROSS (May 5, 2011), https://feross.org/cheating-in-video-games/.

49. *Id.* Cheat codes can also assist the player in aiming a weapon, allow players to acquire powerful items who would not typically have such items, and illicit sales of in-game currency. *Id.*

50. *See generally* Joseph Rothberg, *Cheating in Gaming: Will Copyright Laws Level Up?*, FORBES (Sept. 1, 2016, 10:00 AM), https://www.forbes.com/sites/legalentertainment/2016/09/01/cheating-in-gaming-will-copyright-laws-level-up/#7df245dd5ccd (explaining that due to the tremendous amount of money at stake and the direct impact that player-created cheat codes have on a developer's revenue stream, video game developers have resorted to legal action as a means of preventing cheating).

51. Field, *supra* note 42.

52. *Id.*

53. Nelson Granados, *Report: Cheating Is Becoming a Big Problem in Online Gaming*, FORBES (Apr. 30, 2018, 5:47 PM), https://www.forbes.com/sites/nelsongranados/2018/04/30/report-cheating-is-becoming-a-big-problem-in-online-gaming/#4f0667627663.

54. *See* Field, *supra* note 42; Rothberg, *supra* note 50.

55. Rothberg, *supra* note 50.

56. Statt, *supra* note 18.

57. *See* Field, *supra* note 42.

Video game developers are no longer seeking legal action solely against adults, but have now turned their legal attentions to suing minors.[58] Allowing developers to successfully sue minors would set a dangerous precedent for families across the United States. Parents' children may be playing games such as Fortnite, and unbeknownst to the parents, their children may think they are innocently using cheat codes in video games. As it may turn out, this cheating just may put the minor and his or her family on the streets.[59]

### *C. Fortnite Is a Child Friendly Video Game*

Fortnite is the global phenomenon that was created by Epic Games, which is a "North Carolina-based developer and publisher of computer games and content creation software."[60] Fortnite is Epic Games's most successful game, as evidenced by the fact that Fortnite alone generates over $3 billion annually[61] and has over 250 million players worldwide.[62]

Fortnite is a co-op survival video game that focuses on exploration, "building fortified structures, and fighting waves of encroaching monsters," or other players that are "hell-bent on killing you or your friends."[63] Players join together online from all over the world to build forts, traps, and to acquire weaponry.[64] These forts and traps are utilized in an effort to rebuild and defend player-populated towns from the monsters that roam the virtual Fortnite world.[65] The real money maker for Epic Games has been the special game mode called "Battle Royale" which "involves dropping . . . a limited number of [random] players into a large [virtual] map."[66] Battle Royale combines Fortnite's building skills described above with intense player-versus-player combat.[67] The last player standing out of all players fighting on the map wins the game.[68]

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58. Statt, *supra* note 18.

59. *See infra* note 106–109 and accompanying text (explaining that Epic Games is seeking up to $150,000 in damages against a minor). The median household income for American families as of 2017 was $62,626. *Real Median Household Income in the United States*, FED. RES. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/MEHOINUSA672N (last updated Sept. 10, 2019). Thus, successfully suing the median American household would lead to bankruptcy. *Id.*

60. Complaint at 4, Epic Games, Inc. v. Rogers, No. 5:17-CV-00534 (E.D.N.C. filed Oct. 23, 2017).

61. Darren Geeter, *'Fortnite' is Free to Play but Makes Billions Anyway*, CNBC (May 25, 2018, 1:19 PM), https://www.cnbc.com/2018/05/25/fortnite-video-games-esports.html.

62. *Number of Registered Users of Fortnite Worldwide from August 2017 to March 2019*, STATISTA, https://www.statista.com/statistics/746230/fortnite-players/ (last updated Aug. 9, 2019) [hereinafter *Fortnite Registered Users*].

63. Complaint, *supra* note 60, at 5.

64. *Id.*

65. *Id.*

66. *Id.* at 8.

67. *Id.*

68. *Id.*

Epic Games made a precedent-shaping decision in designing the Battle Royale game mode.[69] In designing the game mode, Epic decided to provide an even playing field for all players in the game by refusing to sell items that provided players with a competitive advantage, such as custom property that was only available to certain players.[70] Such unfair competitive advantage is precisely what spawns litigation.[71] Game users have developed cheat codes unlawfully to modify video game software in order to gain an unfair competitive advantage over other game players.[72] When game users develop cheat codes, game developers allege that they suffer actual damages, including lost sales and profits as a result of the infringement.[73] Lost profits result from the money that would be made by game developers by selling additional content inside the virtual world of the respective video game.[74] This content can take the form of in-game currency, virtual real estate, and various other virtual items.[75] Epic Games makes it seem as though Fortnite is child friendly.[76] Seeking multiple avenues of legal recourse including suing children for copyright infringement, contributory copyright infringement, and breach of contract claims does not quite seem child friendly.

### *D. Why Sue Your Best Customers?*

Epic Games decided in October 2017 that resorting to legal action against adults was not enough, and decided to take legal action one step further by suing Rogers, a minor, for using a cheat code.[77] It is important to note that Rogers simply used the cheat code; he did not develop or assist in developing the cheat code.[78] The cheat codes he used allowed him to see through different types of solid objects, teleport around the game map, impersonate other players by "'spoofing' that player's user name, or mak[ing] moves that other players cannot, such as a spin followed by an instant headshot to another player."[79] Rogers also posted videos of himself on YouTube using the cheat codes while playing Fortnite.[80] Rogers had

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69. *Fortnite Registered Users*, *supra* note 62.

70. Complaint, *supra* note 60, at 6.

71. Aboukhadijeh, *supra* note 48.

72. *Id*.

73. *See* Complaint, *supra* note 60, at 18.

74. Darren Donahue, *The Sword and the Shield: Rule Enforcement in Virtual Worlds in a Time After* Bragg *and* MDY, 31 REV. LITIG. 435, 438 (2012).

75. *Id.* at 144; *Fortnite End User License Agreement*, EPIC GAMES, https://www.epicgames.com/fortnite/en-US/eula (last visited Nov. 4, 2018).

76. *See* Allison Slater Tate, *Kids Are Obsessed with Fortnite. Is It Bad for Them?*, TODAY (Aug. 20, 2018, 12:14 PM), https://www.today.com/parents/kids-are-obsessed-fortnite-it-bad-them-t134844.

77. Complaint, *supra* note 60, at 1.

78. Motion to Dismiss, Epic Games v. Inc. v. Rogers, No. 5:17-CV-00534 (E.D.N.C. filed Nov. 15, 2017).

79. Complaint, *supra* note 60, at 12.

80. *Id.* at 3.

nearly 8,000 subscribers on his YouTube channel.[81] Epic Games became aware of this and requested that YouTube delete Rogers's account, which YouTube did.[82] Rogers was also banned from Fortnite.[83] Rogers created thirteen more accounts on Fortnite, each of which was deleted by Epic Games.[84] Epic Games claims the lawsuit is justified because Rogers used the cheat codes "in a deliberate attempt to destroy the integrity of, and otherwise wreak havoc in, the Fortnite game."[85] The suit was filed to prohibit Rogers from ruining the game for other players and to prevent any additional revenue loss for Epic Games.[86]

Epic Games is suing Rogers based on three claims for relief.[87] These claims include copyright infringement in violation of the Copyright Act, contributory copyright infringement in violation of the Copyright Act, and a breach of contract claim for violating Epic Games's End User Licensing Agreement and Terms of Service.[88] The breach of contract is incredibly important because Epic Games is not simply seeking an injunction that would ban Rogers from ever playing Fortnite again, but is actively seeking monetary damages.[89]

Epic Games first alleges that it suffered actual damages due to lost sales and profits as a result of Rogers's use of the cheat codes.[90] Epic Games claims that Rogers infringed upon Epic's copyright in Fortnite "by improperly using computer software that injects code into Fortnite's code which then materially modifies and changes Fortnite's code, thereby creating an unauthorized derivative work of Epic's copyrighted Fortnite code" as well as by "publicly displaying . . . the unauthorized derivative works . . . [in] [v]ideos as posted on YouTube."[91] Epic Games is seeking monetary damages because it claims to have no adequate remedy at law due to Rogers's use of the cheat codes and the continual damages resulting therefrom.[92]

Epic Games's second claim for relief is a contributory copyright infringement claim.[93] This claim is both for an injunction enjoining Rogers from continuing to play Fortnite and for additional damages due to lost profits

81. *Id.* at 13. While this may seem like a large number, another teenager was doing activities similar to Rogers's but had 243,000 Twitter followers. *See infra* Part VI.C (explaining that although another teenager committed similar breaches of Epic Games's online contract and had over thirty times as many followers as Rogers, Epic Games did not seek legal action against the teenager).

82. Complaint, *supra* note 60, at 13.

83. *Id.* at 16.

84. *Id.*

85. *Id.* at 12.

86. *See id.* at 12, 18.

87. *Id.* at 17–22.

88. *Id.*

89. *Id.* at 1.

90. *Id.* at 18.

91. *Id.* at 17.

92. *Id.* at 18.

93. *Id.* at 19–21.

after Rogers posted videos of himself using the cheat codes on his YouTube account.[94] Epic Games is seeking damages in addition to an injunction because it believed its remedy at law to enjoin Rogers from playing the game is not adequate to redress the harm suffered, and that without monetary damages, the harm will continue.[95] Epic attempts to further legitimize its claim for damages by stating that Rogers engaged, knew, or at least should have known that "the preparation of derivative works based upon Epic's Fortnite software infringes Epic's copyrights in the software."[96] Epic Games distinguishes this claim from its breach of contract claim to satisfy additional damages by stating that Rogers's use of the cheat codes materially contributed to the infringement of Epic's software, and that Rogers encouraged other cheaters to use the same cheat code on Fortnite.[97]

Epic Games's third and most important claim for relief is a breach of contract claim.[98] Epic Games alleges that Rogers agreed to Epic's EULA and TOS by creating an account with Epic and accessing and playing the game Fortnite.[99] Epic claims that by clicking "agree" to its EULA and TOS, Rogers "continued to knowingly, intentionally, and materially breach the Terms and EULA."[100] Epic Games's EULA prohibits a player from, among other things, making derivative works based on Fortnite content and from developing, distributing, or using unauthorized software modifications to gain a competitive advantage in any of the Fortnite game modes.[101] Epic Games claims that Rogers knew about the EULA and was aware of the provisions listed in the EULA.[102] According to Epic Games, Rogers, with *full knowledge of all provisions in the EULA*, breached the contract and "intentionally and willfully encouraged and induced users of Fortnite to use the cheat."[103] Epic Games once again claims that injunctive relief alone is not enough and seeks compensatory damages against Rogers.[104]

There are two critical thoughts to keep in mind while reading the remainder of this Comment. First, Epic Games is not suing a minor for creating a cheat code, but rather, it is suing a minor for an unconscionable amount of money for simply *using* the cheat code that was created by another

94. *See id.* at 19.
95. *Id.* at 21.
96. *Id.* at 20.
97. *Id.* at 19.
98. *See id.* at 21–22.
99. *Id.* at 22.
100. *Id.*
101. *Id.* at 22.
102. *Id.* at 23.
103. *Id.*
104. *See id.* at 22.

player.[105] These cheat codes are not difficult to obtain.[106] Rogers does not possess any sort of computer wizardry that the majority of people do not possess.[107] These cheat codes are free and are readily available to the general public by conducting an internet search.[108] Second, not only is Epic Games seeking to prevent Rogers from playing Fortnite or creating additional Fortnite accounts, but it is also seeking up to $150,000 in damages for lost profits, claiming it has no other adequate legal remedy.[109] If the North Carolina district court rules in favor of Epic Games, there would be precedent that other video game developers could use to bolster their lawsuits against minors. That means that a video game developer that is making over $3 billion in revenue annually from a single video game "could bankrupt a family for the naive actions of a young teenager."[110]

## III. THE LAW'S PURPORTED PROTECTION OF MINORS

Traditionally, society has placed restrictions on minors or "infants," as they have historically been called.[111] Although the modern treatment of minors differs from their treatment at common law, and multiple exceptions have developed regarding minors' rights, it is helpful to first discuss the rights of minors in the past under the infancy doctrine and how modern changes have led to a restriction in the protection of minors.

### *A. An Overview of the Infancy Doctrine*

The infancy doctrine is a basic contract concept dating back to the fifteenth century that allows minors to disaffirm or consider any contract entered into "voidable,"[112] or put another way, "allow[s] minors to avoid any act, contract, or conveyance that is not manifestly in their interest."[113] Once a contract has been disaffirmed, the contract is treated as if it never existed.[114] Once the minor has returned the consideration or property received from the

105. *See id*. at 20; Statt, *supra* note 18.

106. *See* Charlie Hall, *Epic Games Is Suing More Fortnite Cheaters, and at Least One of Them Is a Minor*, POLYGON (Nov. 27, 2017, 1:49 PM), https://www.polygon.com/2017/11/27/16705184/epic-games-suing-fortnite-cheaters-minor-14-years-old.

107. *See id.*

108. *Id.*

109. *Id.*

110. *See* Statt, *supra* note 18.

111. *See* Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 50 (2012).

112. RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. b (AM. LAW INST. 1981); *see* Preston & Crowther, *supra* note 111, at 50. The age of majority in most jurisdictions, including Texas, is eighteen years of age. *See* E. ALLAN FARNSWORTH, CONTRACTS § 4.3 (4th ed. 2018).

113. 7C TEXAS JURISPRUDENCE PLEADING AND PRACTICE FORMS § 142:2 (Jared L. Kronenberg ed., 2d ed.).

114. *See* LORD, *supra* note 5, § 9:16.

contract, the minor may recover any consideration paid before disaffirming the contract.[115]

The infancy doctrine provides invaluable protection for minors in two ways: It provides protection from (1) adults who may not be acting in the best interest of the minors; and (2) from the minor's own poor judgment.[116] As the Texas Supreme Court stated in 1943, the purpose for the infancy doctrine's existence "is to protect the infant against his own imbecility and lack of discretion, and against the craft of others."[117]

There are multiple defenses to the infancy doctrine including, but not limited to, contracts made for necessities, emancipation, misrepresentation of age, and unconscionability.[118] This Comment, however, will only focus on the retained benefits defense; all other defenses are beyond the scope of this Comment.

### *B. You Call That a Benefit?*

Historically, the infancy doctrine applied only to tangible personal property, and the minor was simply required to return any tangible benefit received as consideration that was still in the minor's possession.[119] This is known as the "retained benefits defense."[120] This defense is a common law defense that was created to help mitigate the economic loss of adults contracting with minors.[121] The defense protects the contracting adult by disallowing the minor to both retain the benefits of the contract—such as retaining possession of the consideration or property given by the seller—and disaffirm detrimental provisions of the contract that would result in some form of contractual liability.[122]

The requirement to return the consideration or benefit that is still in the minor's possession does not necessarily mean that the minor is liable for any damage that may have been inflicted on the property while in the minor's possession.[123] Many courts, including courts in Texas, have held that returning damaged or used consideration or property is sufficient for a minor

115. *See* James v. Barnett, 404 S.W.2d 886, 888 (Tex. App.—Dallas 1966, writ ref'd n.r.e.); TEXAS JURISPRUDENCE PLEADING AND PRACTICE FORMS, *supra* note 113.

116. *See* 43 C.J.S. *Infants* § 210 (2011); Preston & Crowther, *supra* note 111, at 50–51.

117. Ferguson v. Hous., E. & W. Tex. Ry. Co., 11 S.W. 347, 347 (Tex. 1889).

118. *See* Preston & Crowther, *supra* note 111, at 55–57, 59–62.

119. RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. c (AM. LAW INST. 1981); *see* Preston, *supra* note 8, at 237–38 (citing RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:2 (4th ed. 2019)) (explaining that when minors disaffirm a contract, they must return the *tangible* property that is still in existence).

120. *See* LORD, *supra* note 5, § 9:14.

121. *See* Preston, *supra* note 8, at 233.

122. *See* LORD, *supra* note 5, § 9:14.

123. *See id.*; Preston & Crowther, *supra* note 111.

to disaffirm a contract.[124] For example, if a minor purchased a car, the minor could disaffirm the contract and return the car to the seller even if there was some noticeable wear and tear to the car—no harm, no foul.

Technology has played an important, yet damaging part in the extension of the retained benefits defense to the infancy doctrine.[125] The example above regarding the purchase of a car seems simple enough. Minors purchase a car, disaffirm the contract relieving themselves of any contractual liability, and simply return the car to the seller. Allowing minors to keep the benefit of the contract—in this example, retaining possession of the car—seems unfair when they disaffirm the contract and recover their proceeds paid for the car. Courts have taken this general notion of unfairness to the adult contracting party and have run with it, resulting in a dramatic change in the law on what constitutes a benefit for the minor.[126]

As explained more thoroughly below, the definition of benefit has been expanded by modern courts.[127] When created, the retained benefits defense was meant to apply to situations such as in *Cain v. Coleman*, in which the minor was required to return possession of the car after disaffirming the contract.[128] The requirement to return the consideration would result in a windfall for the minor. As evidenced by *A.V. v. iParadigms, L.L.C.*, however, the definition of a benefit has been extended to nominal "benefits," such as allowing a student to turn in a paper for a high school class in order to receive a passing grade.[129] Because few states have enacted statutes concerning the infancy doctrine and defenses like the retained benefits defense, the courts have been left to decide whether to extend the defense to intangible consideration with varying results.[130] When properly applied, the retained benefits defense provides adults and companies with some sort of security by preventing minors from taking advantage of them.[131] However, the current

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124. *See, e.g.*, Gillis v. Whitley's Disc. Auto Sales, Inc., 319 S.E.2d 661, 667–68 (N.C. Ct. App. 1984) (holding that the return of a damaged vehicle was sufficient to enable disaffirmance); Cent. Bucks Aero, Inc. v. Smith, 310 A.2d 283, 285 (Pa. Super. Ct. 1973) (permitting disaffirmance despite damage of an airplane beyond repair); James v. Barnett, 404 S.W.2d 886, 888 (Tex. App.—Dallas 1966, writ ref'd n.r.e.) ("[T]he general rule is that a minor may repudiate his contract for the purchase of personal property and is entitled to the return of the money he has paid under the contract."); *see also* E. ALLAN FARNSWORTH, CONTRACTS § 4.3 (4th ed. 2018) (quoting Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 726 (Me. 1924)) (explaining that such losses from damages to the consideration while in the minors' possession are "the result of the very improvidence and indiscretion of infancy which the law has always in mind").

125. *See* Victoria Slade, Note, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE U. L. REV. 613, 614 (2011).

126. *See id.* at 617.

127. *See infra* Part III.C (noting the different court interpretations of the retained benefits defense).

128. Cain v. Coleman, 396 S.W.2d 251 (Tex. App.—Texarkana 1965, no writ) (explaining that a father sued on behalf of his minor son to recover money paid for a used automobile after the minor son disaffirmed the contract).

129. *See* A.V. v. iParadigms, L.L.C., 544 F. Supp. 2d 473, 481 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom.* A.V. *ex rel*. Vanderhye v. iParadigms, L.L.C., 562 F.3d 630 (4th Cir. 2009).

130. *See infra* Part III.C (discussing the differing views of courts on the retained benefits defense).

131. *See* LORD, *supra* note 5, § 9:14; Preston & Crowther, *supra* note 111, at 78–79.

state of the law and the extension of the retained benefits defense to intangible goods has provided an overabundance of protection for adults and has now put minors in an extremely vulnerable position.[132]

### *C. State Courts' Differing Interpretations of the Retained Benefits Defense*

Many states have dramatically and inconsistently restricted minors' rights to disaffirm contracts without much explanation or reasoning for doing so.[133] Some critics have argued that this is necessary for modern times.[134] Some important cases below highlight common law decisions that have continued to narrow the protections of the infancy doctrine. The last case, *A.V. ex rel. Vanderhye v. iParadigms, L.L.C.*, could be the nail in the coffin for the infancy doctrine in today's technologically advanced society.[135]

#### *1. Texas's Historical Perspective on the Infancy Doctrine*

In 1973, the Texas Supreme Court followed other state opinions and created a limitation on the infancy doctrine by disallowing a minor to disaffirm his contract because a minor should not be allowed to retain the benefits of a contract while repudiating its obligations.[136] In *Dairyland County Mutual Insurance Co. v. Roman*, the plaintiff sued Dairyland to recover damages for injuries he suffered as a result of an auto accident.[137] At the time of the accident, the plaintiff was nineteen years old and was the named insured in an automobile liability insurance policy issued by Dairyland.[138] There was a provision in the insurance policy that required the policyholder to give notice of the accident as soon as practicable as a condition precedent to liability.[139] The minor did not inform the insurance company until fifty-one weeks after the accident, which violated the condition precedent to liability.[140]

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132. *See* Slade, *supra* note 125, at 616.

133. *Id.* at 619 n.44 (quoting 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)) (explaining that the infancy doctrine has "developed in a patchwork and inconsistent fashion"). Decisionmakers of all kinds, including state legislatures and state courts, have made changes to the infancy doctrine without a comprehensive understanding of how minors process information and behave. *Id.*

134. *See infra* Part V.A (discussing some critics' views that minors should be held contractually liable, similar to an adult, to prevent minors from abusing the infancy doctrine).

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

136. Dairyland Cty. Mut. Ins. Co. v. Roman, 498 S.W.2d 154, 158 (Tex. 1973).

137. *Id.* at 156.

138. *Id.* The statute lowering the age of majority in Texas was not amended until August 1973, which was approximately six weeks after the case was decided. *Id.* at 160 n.1.

139. *Id.* at 157.

140. *Id.*

Ruling in favor of the insurance company, the Texas Supreme Court held that the notice provision of the insurance policy "can be of benefit to the policyholder as well as to his detriment, because the investigation that is ordinarily made by an insurance company after receipt of timely notice may be of assistance to the insured in defending claims above the policy limits."[141] The Court went further to hold that a "minor may set aside the entire contract at his option, but he is not entitled to enforce portions that are favorable to him . . . [but] disaffirm other provisions that he finds burdensome. He is not permitted to retain the benefits of a contract while repudiating its obligations."[142] This was one of the first cases in Texas interpreting the retained benefits defense as a restriction on a minor's right to disaffirm a contract.

This case focused on the fact that the minor was trying to enforce the beneficial provisions of the insurance agreement—ability to collect insurance proceeds—but to disaffirm the notice provision required in the contract, which prohibited him from collecting the proceeds.[143] As of 1973, the Texas Supreme Court's interpretation of the infancy doctrine was that a minor must disaffirm the entire contract; a minor could not attempt to ratify the beneficial provisions and disaffirm specific harmful provisions.[144]

### *2. Texas's Modern View of the Infancy Doctrine*

In 2014, the Houston Court of Appeals diverted from the Texas Supreme Court's holding in *Dairyland* on the retained benefits defense. In *PAK Foods Houston, L.L.C. v. Garcia*, a minor's mother sued PAK Foods Houston seeking recovery of medical expenses for an injury sustained at work.[145] The minor herself signed an employment contract to work at PAK Foods.[146] PAK Foods asserted that the minor agreed to arbitrate any and all disputes by signing the employment contract.[147] The minor argued that even though she did sign the employment contract, she "disaffirmed it by terminating her employment and filing suit, rendering the agreement void."[148] In affirming the trial court's findings, the appellate court held that the minor would not be bound by the arbitration provision because she disaffirmed it by terminating her employment and electing to file suit.[149] In a surprising opinion, the appellate court held that the minor could enforce the beneficial

141. *Id.* at 157–58.
142. *Id.* at 158.
143. *Id.*
144. *Id.*
145. PAK Foods Hous., L.L.C. v. Garcia, 433 S.W.3d 171, 173–74 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd).
146. *Id.* at 173.
147. *Id.*
148. *Id.* at 174.
149. *Id.* at 177.

provisions of the contract—allowing her to sue PAK Foods to recover for her medical expenses—and disaffirm the detrimental provisions of the Contract—requirement to arbitrate all disputes.[150]

The dissent strongly argued against the majority's opinion, advocating that the majority follow Texas common law precedent from *Dairyland*.

> Texas law does not permit a minor to "cherry pick" the terms of a contract she seeks to enforce or avoid. A minor who has elected to accept employment and who has agreed to the employer's conditions for that employment is not at liberty to pick and choose which terms she will honor and which she will not. S.L. should not be allowed to do so.[151]

This case creates an ambiguity in the Texas common law. The Court in *Dairyland* held that a minor could not disaffirm harmful provisions and seek to benefit from the beneficial provisions, but the *PAK Foods* court disagreed.[152] The holding in *Dairyland* is exactly what Epic Games is arguing for in *Epic Games v. Rogers*.[153] Depending on the outcome of the Epic Games lawsuit, Texas courts may look to the dissent's reasoning in *PAK Foods* to follow the holding from *Dairyland* in the future.[154]

### *3. The Fourth Circuit's Nullification Effort*

In a recent case involving the retained benefits defense, a Virginia district court applied the retained benefits defense to an online service and an intangible benefit.[155] *A.V. v. iParadigms, L.L.C.* involved a few high school minors who submitted their homework to Turnitin as part of a high school assignment.[156] Turnitin is an antiplagiarism program owned by iParadigms, which is used by many schools throughout the country, that maintains a database of all submitted papers and compares all newly submitted papers against those in the database to determine if the papers match or not.[157] If the newly submitted paper is identical enough to any papers in the database, teachers will be notified that the paper was plagiarized.[158]

The high school students in *iParadigms* clicked "I Agree" in order to submit their papers for grades.[159] But in an attempt to prevent collection of their written works by Turnitin, the students included handwritten

150. *Id.*
151. *Id.* at 179 (Frost, C.J., dissenting) (footnote omitted).
152. Dairyland Cty. Mut. Ins. Co. v. Roman, 498 S.W.2d 154, 157–58 (Tex. 1973).
153. *Id.* at 177; *see* Epic Games, Inc. v. Rogers, No. 5:17-CV-00534 (E.D.N.C. filed Oct. 23, 2017).
154. *Dairyland*, 498 S.W.2d at 158; *PAK Foods*, 433 S.W.3d at 178–79.
155. A.V. v. iParadigms, L.L.C., 544 F. Supp. 2d 473, 480 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom.* A.V. *ex rel.* Vanderhye v. iParadigms, L.L.C., 562 F.3d 630 (4th Cir. 2009).
156. *Id.*
157. Slade, *supra* note 125, at 620–21.
158. *Id.*
159. *iParadigms*, 544 F. Supp. 2d at 478.

disclaimers on the face of their submitted papers illustrating their lack of consent to Turnitin's archiving of their work.[160] Nevertheless, Turnitin archived the work against the minors' written disclaimer, and as a result, the students sued Turnitin for copyright infringement.[161] The court held that even a seemingly minor benefit—the ability of students to turn in homework in order to receive a passing grade—estops the minor from being able to disaffirm a contract.[162] The court ruled that when a minor enters into any contract subject to conditions or stipulations, the minor cannot take the benefit of the contract without the burden of the conditions or stipulations.[163] The court did not allow disaffirmance of the contract because the minors had acquired a benefit.[164] The court ruled that the benefit the minors received from the contract was the privilege of maintaining good standing in their class by receiving a grade from their teachers for their paper and also the benefit of having the standing to sue Turnitin.[165]

The district court reasoned that the denial of the minor's right to disaffirm the contract by claiming infancy defense was based on two thoughts of reasoning.[166] The first relied on a questionable expansion of the definition of benefit.[167] The court also ruled that a minor cannot use the infancy defense as "a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong."[168] The district court's holding is not insignificant. As stated above, the so-called benefits that the high school students received were minor.

On appeal, the Fourth Circuit affirmed part of the district court's holding and reversed part of the district court's holding.[169] In a surprising move, the Fourth Circuit dodged the most central part of the district court's holding, which was the district court's rejection of the minor's asserted use of the infancy doctrine.[170] The Fourth Circuit cited Williston on Contracts as part of its reasoning.[171] The Williston on Contracts provision clarifies that the retained benefits defense fails if the minor does not have possession of any tangible consideration or benefit.[172] Neither benefit received by the minors in this case, however, technically qualifies as consideration.[173] The benefit of

160. *Id.*
161. *Id.*
162. *Id.* at 481.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*; Slade, *supra* note 125, at 621.
168. *iParadigms*, 544 F. Supp. 2d at 481 (quoting MacGreal v. Taylor, 167 U.S. 688, 701 (1897)).
169. A.V. *ex rel.* Vanderhye v. iParadigms, L.L.C., 562 F.3d 630, 630 (4th Cir. 2009).
170. *Id.* at 645 n.8 (elaborating on the Fourth Circuit's decision not to address whether the terms of the Clickwrap Agreement on Turnitin's website created an enforceable contract).
171. *See* LORD, *supra* note 5, § 9:14; Preston, *supra* note 8, at 237–38.
172. LORD, *supra* note 5, § 9:14.
173. *See* Preston, *supra* note 8, at 237–38.

receiving a passing grade is given by the school, not iParadigms.[174] Thus, the students did not receive that benefit at all from iParadigms.[175] Also, standing to sue cannot be the consideration for a contract because it is implicit in the formation of a contract.[176] Both the district court's and the Fourth Circuit's holdings are undermined by the fact that the minors did not receive a benefit from iParadigms in the contract, and by the fact that historically, minors have been allowed to disaffirm the contract even if they have received a benefit.

The case represents both a departure from the historical common law infancy doctrine by allowing the retained benefits defense to include intangible property, and an expansion of the definition to benefit to include *de minimis* benefits from one-sided contracts entered into against one's will.[177] By recognizing such a minimal benefit as sufficient to prevent contract disaffirmance by minors, the Fourth Circuit's holding exemplifies modern courts' growing disapproval of the infancy doctrine and has pushed it one step closer to nullification.

### *D. Statutory Modifications to the Infancy Doctrine*

Due to trial courts' differing interpretations on the infancy doctrine, "the common law in the area of 'infant's rights has been slow to evolve.'"[178] In an effort to provide more of a bright-line rule, a few states have enacted statutes regarding the infancy doctrine.[179] The statutes enacted by these states only affect the contractual rights of minors in "specialized work" and "doing business" situations, which affect minor's right to engage in employment in the entertainment industry.[180] The majority of state statutes on the infancy doctrine focus, however, on tort law and criminal law, while leaving much of the infancy doctrine's fate and effect on contract law to the courts.[181]

Texas lacks statutory clarity by refusing to spell out minor's rights and the scope of the infancy doctrine. One of the only statutes on point is § 129.001 of the Civil Practice & Remedies Code.[182] This statute simply

174. *Id.* at 238.
175. *Id.*
176. *Id.*
177. *See* Jeff Neuburger, *Are Clickwrap Agreements with Minors Enforceable? The Fourth Circuit Won't Say, but the District Court Said Yes*, PROSKAUER: NEW MEDIA & TECH L. BLOG (Apr. 30, 2009), http://newmedialaw.proskauer.com/2009/04/30/articles/contracts/are-clickwrap-agreements-with-minors-enforceable-the-fourth-circuit-wont-say-but-the-district-court-said-yes (explaining that the district court's holding is very favorable for companies looking to enforce clickwrap agreement agreed to by minors).
178. Larry DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 510 (1994).
179. *See id.*
180. *See id.* at 511–14.
181. *See id.*
182. TEX. CIV. PRAC. & REM. CODE ANN. § 129.001.

prescribes the age of majority as eighteen.[183] The statute does not describe what types of contracts it applies to or whether there are any exceptions, nor does it describe a minor's ability to disaffirm.[184] Although many decisions have been handed down by the Texas Supreme Court and appellate courts throughout the state, the Texas Legislature has not stepped in to help clarify the infancy doctrine since 1985,[185] leaving the future of the infancy doctrine in Texas in the hands of the judicial system.[186]

## IV. JUDICIAL ENFORCEMENT OF MINORS' ONLINE CONTRACTS

While courts have historically been willing to protect the rights of minors by acknowledging their right to disaffirm their contracts, the *iParadigms* case analyzed above provides a perfect example of how the common law is dissolving the infancy doctrine. Generally, courts at least attempt to apply the same principles when considering online contracts.[187] The general principles of contract law regarding the infancy doctrine include considering the general right to disaffirm in given situations and then considering if the respondent party has any potential defenses.[188] The attempt to apply the same principles has not been as successful as one would hope, due to the additional complexities posed by the internet and electronic goods and services.[189]

While minors may be free to act as they wish in the real world, subject to rules enforced by their parents, teachers, etc., their actions are severely restricted by online contracts.[190] Minors' actions are severely restricted by two types of now-typical online contracts: End User Licensing Agreements and Terms of Service.[191] There is a difference between these two types of online contracts.[192] EULAs are intended to cover software applications and TOS are used to govern websites or virtual worlds.[193] Similar to online

183. *Id.*

184. *See id.*

185. *Id.*

186. *See, e.g.*, Prudential Bldg. & Loan Ass'n v. Shaw, 26 S.W.2d 168 (Tex. 1930); Cole v. McWillie, 464 S.W.3d 896 (Tex. App.—Eastland 2015, pet. denied); PAK Foods Hous., L.L.C. v. Garcia, 433 S.W.3d 171 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd); LAWRENCE A. WAKS & BRAD L. WHITLOCK, 1 TEX. PRAC. GUIDE BUS. TRANS. § 1:26 (2019).

187. *See* Preston, *supra* note 8, at 230–31.

188. *Id.* at 230–34.

189. *Id.* at 230–31.

190. *See* Ryan Patrick Murray, *Myspace-ing Is Not a Crime: Why Breaching Terms of Service Agreements Should Not Implicate the Computer Fraud and Abuse Act*, 29 LOY. L.A. ENT. L. REV. 475, 479–81 (2009).

191. *See* Leah Hamilton, *EULA v. Terms of Use for a Mobile App*, TERMSFEED (Nov. 20, 2016), https://termsfeed.com/blog/eula-vs-terms-of-use-mobile-app/; *see generally* David Berreby, *Click to Agree with What? No One Reads Terms of Service, Studies Confirm*, GUARDIAN (May 3, 2017, 8:38 AM), https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print.

192. *See* Hamilton, *supra* note 191.

193. *See id.*

contracts used by many retailers and service providers, video games will more than likely have both types of agreements to access the game content.[194] This Part provides a more in-depth dive into what these two online contracts are and how they affect minors' rights by the simple click of a button.

### *A. Licensing Agreements End Users' Freedoms*

An EULA is a contract between the purchaser of software, such as a player of a video game and a developer, to which the developer gives the player a right to use the copy of the software in the form of a limited license.[195] EULAs will take many law students back to the tumultuous days of contracts in their first year of law school. Specifically, EULAs can be traced back to the case of *ProCD, Inc. v. Zeidenberg*.[196] At issue in that case was the enforceability of shrink-wrap licenses.[197] The district court refused to enforce the contract in that case, claiming that the defendant-consumers did not have the opportunity to negotiate or object to the proposed user agreement contained within the shrink-wrap agreement, nor did they have the opportunity to review the agreement before purchase.[198] The district court also found that the defendant-consumers did not explicitly assent to the terms after learning of the terms, so they could not be bound by the user agreement.[199] Notwithstanding the district court's findings, the Seventh Circuit on appeal explained that the shrink-wrap agreement must be considered enforceable so that contract law can adjust to the practical circumstances of a fast-paced and high-volume market—circumstances that make traditional requirements of contract negotiation and term transparency unreasonable.[200]

Contract law has continued to evolve since the days of *ProCD* by enforcing more contracts that would otherwise fail under a traditional contractual assent analysis.[201] EULAs are governed by general principles of contract law because they are simply contracts.[202] Today, most developers

194. A.V. v. iParadigms, L.L.C., 544 F. Supp. 2d 473, 478–79 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom.* A.V. *ex rel.* Vanderhye v. iParadigms, L.L.C., 562 F.3d 630 (4th Cir. 2009) (noting that Turnitin had both an EULA that users accepted by clicking agree, but also had a TOS titled "Usage Policy," and both agreements had to be accepted by the minors in order to access the website); Alex Hern, *I Read All the Small Print on the Internet and It Made Me Want to Die*, GUARDIAN (June 15, 2015, 6:56 AM), https://www.theguardian.com/technology/2015/jun/15/i-read-all-the-small-print-on-the-internet.

195. Hamilton, *supra* note 191.

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

197. *Id.* at 1452. A shrink-wrap license is a form of contract, the full terms of which are located within a sealed package, often covered in shrink wrap. *Id.* at 1449.

198. ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640, 655 (W.D. Wis. 1996), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

199. *Id.*

200. *ProCD*, 86 F.3d at 1452–53.

201. *See* Preston & Crowther, *supra* note 111, at 73–77.

202. Donahue, *supra* note 74, at 443–44.

have taken advantage of courts' willingness to enforce the contracts by using click-wrap agreements, which are online contracts requiring users to click "agree" in order to access the website or video game content.[203] Typically, by clicking "agree," the player is agreeing to both the EULA and TOS.[204] EULAs typically involve claims of copyright infringement because the EULA defines how a user may use the software and specifies that the user has a limited license to use the service or video game.[205]

### *B. The Police Force of the Virtual World*

In addition to EULAs, game users are bound by the game developer's TOS.[206] A TOS does not give players a limited license to download a copy of the software like an EULA does, but instead regulates how a player may use the software.[207] TOS's are written broadly so that they can cover a multitude of situations involving unauthorized uses of the software.[208] For instance, Epic Games's TOS includes a section titled "Prohibited Uses."[209] The section states, "you agree not to access or use the Services for any purpose that is illegal or beyond the scope of the Services' intended use (*in Epic's sole judgment*)."[210] Similar to the EULA, players do not have the ability to negotiate terms of the contract and are mandated to agree to all terms contained within the TOS in order to access the game content.[211]

However, this Comment will discuss the true problem in a later section which brings to light the fact that while people click "agree" (most only click "agree" because no option is provided to disagree), they do not actually understand the terms and conditions that they have just agreed to.[212] Thus, clicking "agree" in no way proves that users are aware of the provisions contained within the EULA or TOS.[213]

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203. Chang & Alemi, *supra* note 35, at 637.

204. Hamilton, *supra* note 191 (explaining that developers can ensure enforceability by courts by including an "I Accept" button because this proves that users have agreed to the terms and conditions).

205. *See* Donahue, *supra* note 74, at 456.

206. Complaint, *supra* note 60, at Exhibit 13 ("[U]se of the Services is . . . governed by Epic's Terms of Service . . . . By . . . using the Software, you also agree to Epic's Terms of Service.").

207. Hamilton, *supra* note 191.

208. *See id.*

209. *Terms of Service*, EPIC GAMES, https://www.epicgames.com/site/en-US/tos (last visited Jan. 2, 2020).

210. *Id.* (emphasis added).

211. Preston, *supra* note 8, at 227.

212. *See infra* Part VI.A (explaining that clicking "agree" does not mean that the user understands or agrees to all terms and conditions contained within the online contract).

213. *See infra* Part VI.A (explaining that clicking "agree" does not mean that the user understands or agrees to all terms and conditions contained within the online contract).

## V. BATTLE OF THE SCHOLARS: MINORS' COGNITIVE UNDERSTANDING OF CONTRACT LAW

There are two competing perspectives on the protections the infancy doctrine affords minors and minors' understanding of contract law. Before jumping into these two perspectives, a basic understanding of cognitive development is helpful in understanding what the critics are advocating for. "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."[214] One scholar has noted that "legal reasoning involves perceiving, appraising, interpreting, evaluating, and ultimately choosing among 'legal truths.'"[215] "Cognitive development has also been described as a conceptual framework within which a person interprets and defines rules affecting his societal rights and obligations."[216] Considering minors' cognitive abilities is imperative in discerning the potential consequences of breaching a contract "because the risk-assessment abilities that are critical for decision making are the areas where children and teens are most lacking."[217]

Scholars' difference in opinion regarding the infancy doctrine and minor's ultimate decision making stems from the "belief that minors lack cognitive decision-making capacity and are thus not able to comprehend the extent of their rights and responsibilities in a commercial setting."[218] The opponents claim that minors possess similar cognitive decision-making skills to adults and are receiving a windfall by asserting the infancy doctrine because these minors are fully aware that they have no consequences for breaching contracts that they willingly entered into.[219] The proponents claim and present evidence that the minors should not be held contractually liable for breaching contracts they have entered into because there are significant cognitive differences between minors and adults.[220] Although minors may possess similar decision-making capabilities in some circumstances, they are inherently unaware of what terms and provisions they are agreeing to in online contracts such as click-wrap and browse-wrap agreements.[221]

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214. Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 249 (2008).

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

216. Daniel, *supra* note 214, at 249.

217. Slade, *supra* note 125, at 629.

218. Daniel, *supra* note 214, at 249–50.

219. *Id.* at 249–54.

220. Slade, *supra* note 125, at 631.

221. *Id.*

### *A. Critics: Minors Intentionally Dupe Adults*

Many scholars have taken the position that minors possess the ability to make decisions at an indistinguishable level to that of adults.[222] Some of these scholarly critics have taken a harsher view, saying that the protections that the infancy doctrine affords minors is an "infantile paralysis."[223]

> "Infantile Paralysis" is a term well applicable to the state of the law governing an infant's responsibility for his contractual . . . obligations. The rigid niceties involved are indeed perplexing. Infancy has ever been a safe base from which one might embark upon piratical expeditions against innocent adults and to the technical defenses of which he could return for security.[224]

These scholars discuss a series of studies suggesting that by age fourteen, an individual possesses cognitive capabilities comparable to young adults to understand, appreciate, and articulate decisions.[225] The empirical data collected and examined by these scholars examines the average contracting party's conscious decision making when entering into a contract, and they come to the conclusion 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."[226] Rather, the contracting parties informally weigh the amount of work necessary to make a fully informed decision versus the foreseeable risks and consequences of an undesired contractual event.[227] The contracting parties then choose a satisfactory course of action in lieu of an optimal decision.[228] "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.'"[229]

The categorical view of conscious decision making may be acceptable for adults, but it is unacceptable when considering minors and click-wrap agreements, which are contracts of adhesion that do not furnish minors with the ability to weigh the costs of making a fully informed decision against the foreseeable risks.[230] While the findings above correctly apply to adults, it

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222. *See generally* Chang & Alemi, *supra* note 35, at 640–43; Daniel, *supra* note 214, at 253.

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

224. *Id.*

225. Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1286 (2000).

226. Daniel, *supra* note 214, at 251.

227. *Id.*

228. *Id.*

229. *Id.*

230. *See* Rakoff, *supra* note 19, at 1179–80. Click-wrap agreements are contracts of adhesion because there is no equal bargaining power. *Id.* In order for a consumer to use the software, service, or website,

cannot apply to minors because minors are "deemed to lack the adult's knowledge of the probable consequences of his or her acts or omissions and the capacity to make effective use of such knowledge as he or she has."[231] While adults commonly make a decision in rational ignorance of alternatives, adults have the capability to discover the potential consequences of their actions.[232] Meanwhile minors, "on the other hand, are enticed by rewards packages, design elements, celebrity spokespersons, and other media assaults specifically designed around their blossoming interests, and they can easily fail to weigh the costs and benefits of a transaction."[233]

### *B. Proponents: The Differences Between Adults and Minors Is Toxic*

On the other end of the spectrum, the proponents of the infancy doctrine seek the continued use of the doctrine to preserve the legal protection of minors. Minors are generally understood to be vulnerable when entering into contracts.[234] The studies discussed above, to which critics of the infancy doctrine cling, overlook a fundamental difference between adults and minors: minors' level of processing when making decisions.[235] "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."[236] Due to the difference in minors' level of processing, adults and minors are not on level ground regarding the sensibility and understanding involved with contract formation.[237] The proponents can also look to recent neuroscience research to support their claim that minors and adults have vastly different cognitive abilities.[238] Recent neuroscience research illustrates that minors' brains are

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the consumer must agree to all terms and conditions with absolutely no power to negotiate or contest to any of the contract provisions. *Id.*

231. City of New York v. Stringfellow's of N.Y., Ltd., 684 N.Y.S.2d 544, 551 (N.Y. App. Div. 1999).

232. *See* Daniel, *supra* note 214, at 251.

233. Slade, *supra* note 125, at 631–32 (footnote omitted).

234. *See generally* Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 205–06 (1967) (stating that the rationale behind minors' vulnerability in contract law is that minors lack capacity to understand the nature of their acts, and because of their lack of capacity, adults will take advantage of their naivete); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 212 (1995) (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 12–15 (1979)) (stating that minors' inability to engage in rational decision making stems from their inability to understand the nature and consequences of one's own acts).

235. *See generally* Slade, *supra* note 125, at 628–32.

236. *Id.* at 629.

237. Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 151 (2003). A majority of psychologists conclude that cognitive ability by itself does not define or determine the individual's decision-making capabilities. *Id.* Other factors such as personal and environmental factors influence the individual's ability to make mature judgments. *Id.* at 151–52. "Factors such as uncertainty, stress, and cultural experiences may differentially enhance or impede decision-making capacity." *Id.* at 152.

238. *See* Preston, *supra* note 8, at 262.

structurally immature.[239] Specifically, the study shows that the portion of the brain responsible for impulse control is one of, if not the last, areas of the minor's brain to mature.[240] Thus, minors generally do not have the ability to exhibit adult levels of judgment or control.[241]

The proponents provide a more compelling perspective, and this perspective should be utilized in deciding the *Epic Games v. Rogers* case.[242] As noted above, Rogers was forced to accept all of the terms and conditions included in Epic Games's EULA and TOS in order to play Fortnite.[243] Although Rogers was aware that he was doing something wrong—evidenced by his creation of fourteen different accounts on Fortnite after Epic Games continued deleting his accounts—he was unaware of the severity of his actions, which were buried in thousands of words in Epic Games's click-wrap agreement.[244] For instance, Rogers said in a video response on YouTube to the lawsuit that he should be excused for his actions.[245] According to Rogers, "I'm not in any way trying to ruin the community for fun, . . . I'm just trying to do everything for fun. I cheat for fun. I don't cheat to cheat, to win, to get good at the game. I just cheat for fun."[246] It is clear that at only fourteen years of age, Rogers lacks the knowledge that typical adults would be expected to possess of the probable consequences of their actions and the capacity to utilize the information in making an effective decision. Thus, minors' impulsiveness and risk-taking become toxic when combined with one-click agreements such as EULAs.

## VI. PROBLEMS WITH THE INFANCY DOCTRINE IN A TECHNOLOGICALLY SAVVY WORLD

This Section will focus on the current issues regarding the infancy doctrine's applicability to minors' contractual liability in online contracts. These issues include: (1) the increasing invalidation of minors' rights to claim protection under the infancy doctrine; (2) the false notion that by clicking "accept" or browsing a webpage, minors are aware of the rights, obligations, and consequences included in online contracts, or are intentionally entering into contracts to take advantage of adults; and (3) the *Epic Games* case that could represent the pending doom for the infancy doctrine in American jurisprudence.

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239. *See id.*
240. *Id.*
241. *See id.*
242. *See* Epic Games, Inc. v. Rogers, No. 5:17-CV-00534 (E.D. N.C. filed Oct. 23, 2017).
243. *See* Complaint, *supra* note 60, at 10.
244. *See* Hall, *supra* note 106.
245. *Id.*
246. *Id.*

### *A. The Infancy Doctrine Is Currently in a State of Flux*

Contrary to many courts' holdings regarding the infancy doctrine, such as the Fourth Circuit's in the *iParadigms* case, minors are not intentionally attempting to take advantage of adults when entering into contracts.[247] The infancy doctrine was created to protect minors, and this protection was and is still important due to minors' lack of capacity to understand the nature of their acts.[248]

Courts' recent interpretations have deviated from the historic protection that the infancy doctrine provided minors, as evidenced by the extension of the ability of developers to claim the retained benefits defense for controversies involving intangible property.[249] The retained benefits defense achieves its purpose regarding tangible property; the minor can simply return the consideration when the minor disaffirms the contract.[250] In-game purchases create a new set of problems because the virtual property is intangible.[251] Players can use the equipment, weaponry, etc. that has been purchased in the game, but a player cannot return the virtual items that he or she has purchased to the game developer.

The second problem is the growing perception that minors are fully aware of what liabilities, rights, and obligations they have acquired by entering into an online contract. Critics have praised the extension of the retained benefits defense regarding online contracts because they felt the infancy doctrine provided too much protection for conniving adolescents.[252] The critics essentially claim that all minors are fully aware of all the provisions in the EULA and TOS agreements they enter into, and that even if they are not, the minors should still be held to the same contract obligations and penalties.[253] The hypothetical situation would require the minor to sit down and spend hours reading the click-wrap agreements and looking up various contractual terms in a dictionary to understand what some of these words mean. After reviewing the contract and researching all of the contractual terms, the minor then decides to consciously and intentionally breach these agreements. This hypothetical situation is unrealistic to say the least. The statistics show that minors are not cognitively aware of the contract

247. *See* A.V. v. iParadigms, L.L.C., 544 F. Supp. 2d 473, 481 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom.* A.V. *ex rel.* Vanderhye v. iParadigms, L.L.C., 562 F.3d 630 (4th Cir. 2009).

248. *See* Preston, *supra* note 8, at 231.

249. *See* Neuburger, *supra* note 177.

250. *See* Preston, *supra* note 8, at 232.

251. *See* Chikhani, *supra* note 32.

252. *See* Daniel, *supra* note 214, at 257. "More than anything, the current [infancy] doctrine appears to provide conniving adolescents with a free pass, effectively discouraging any sense of accountability." *Id.*

253. *See id* at 257–58.

terms and conditions.[254] To counter the critics' view one step further, the statistics show that adults do not comprehend the contract provisions contained within the click-wrap agreement to which they just clicked "agree."[255] If adults do not understand contractual terms, and minors have an even lower ability to understand contractual terms, how could one say that minors should be treated the same contractually?

Turning to Fortnite as an example, by agreeing to the EULA and TOS, Fortnite players are agreeing not only to specifically enumerated sections of the TOS regarding illegal uses but also to whatever Epic Games decides is beyond the scope of the services' intended use as evidenced by the "*in Epic's sole judgment*" language.[256] After reading this provision, the sole issue is no longer whether the player read the agreement. The other issue becomes: Does the player know what constitutes a breach of contract in Epic's sole judgment? As one scholar noted, there is a lack of warning signs in TOS, making many of the terms and conditions practically invisible, not to mention extraordinarily lengthy and complex.[257] Developers and retailers are aware that "digital transactions feed on impulsiveness and exaggerate weaknesses in judgment and inaccurate assessments of risk."[258]

Due to minors' limited cognitive understanding of contracts and the ever-increasing complexity of online contracts, minors have become more susceptible than ever to agreeing to the terms and conditions of online contracts.[259] However, both society and the law should not expect the courts to hold minors liable for their naïve actions.[260]

### *B. Technological Skill and Contract Expertise Are Not Equal*

Minors' increasing understanding of technologies at younger ages does not automatically mean that they comprehend all rights, obligations, and liabilities associated with contracts. Adults' and minors' understanding of technology at younger ages than previous generations does not equate to awareness of what contract terms are standard and fair, or even what the contract terms encompass as far as rights and obligations.[261] In addition, technological wherewithal has little or nothing to do with minors'

254. *See supra* Part V.B (providing statistics showing that minors are not cognitively aware of contract terms and conditions).

255. *See supra* Part V.B (providing statistics showing that adults are also traditionally not aware of contract terms and conditions).

256. *See* Complaint, *supra* note 60, at 45 (emphasis added).

257. Preston, *supra* note 8, at 261.

258. *Id.*

259. *See generally* Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 229 (2007) (explaining that a majority of contracts entered into by minors are online contracts of adhesion).

260. *See generally id.* (explaining that in a few clicks, online consumers agree to unforeseen adhesion contract terms).

261. *See* Berreby, *supra* note 191.

understanding of the cost-benefit analysis adults constantly employ when attempting to make decisions.[262]

No single person is born with financial or contractual literacy.[263] All people, and minors specifically, lack an innate understanding of the basic premises of finance such as interest rates, late charges for overdrafts on a bank account, and building a good credit score.[264] For example, a study was conducted by the Programme for International Student Assessment that revealed that one in five American teens lack basic-level skills regarding financial literacy.[265] Minors are clearly different than adults, but most importantly, they are and should continue to be seen as different in their legal capability of understanding the liabilities of the contracts they entered into. Unlike minors, a majority of society expects adults to "accept the risks of their economic pursuits, to research answers, . . . and to otherwise ensure that they are getting a fair deal."[266]

Regardless of the cognitive differences between adults and minors, it is important to note that most adults are not even aware of, nor do they understand, the contractual terms that they are forced to agree with in online contracts.[267] Consumers are certainly not agreeing with all provisions in the click-wrap agreement. Viewed objectively from the developer's point of view, the adults have agreed to all of these terms by clicking "agree." However, viewed subjectively from the contracting adult's point of view, they would not agree to every contract provision if they read the entire click-wrap agreement. As one scholar has said, "If . . . clicking 'I agree' means . . . 'I agree to be legally bound to (unread) terms that are not radically unexpected,' then that—*and nothing more*—is what has been consented to objectively."[268] Therefore, while minors may understand that clicking "agree" means that they have to click the button to proceed to the video game content, and they may understand how to navigate through web pages and

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262. *See* Slade, *supra* note 125, at 629.

263. *See* Preston, *supra* note 8, at 254 (quoting 43 C.J.S. *Infants* § 210 (2018)) (explaining that while adults have some exposure with contractual legalese in online contracts, exposure and understanding of terms included in online contracts such as "hold harmless," "arbitration," and "breach" by minors is unlikely).

264. Alexa Veiga, *Smart Change: How to Help Children Understand Financial Issues*, J. TIMES (Sep. 6, 2017), https://journaltimes.com/business/investment/personal-finance/smart-change-how-to-help-children-understand-financial-issues/article_f32f1995-2dfe-5a19-a322-2eadfc836ce2.html.

265. *Id.*

266. Slade, *supra* note 125, at 631.

267. *See* Rakoff, *supra* note 19, at 1179 ("[T]he adhering party is . . . unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them."); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 242 (2002) (discussing statistics suggesting that adhering parties are unlikely to understand critical information and provisions when agreeing to consumer contracts); *see also* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 840–41 (2006) (explaining that internet users do not usually read the terms of online contracts, let alone understand the terms and conditions or all potential risks attached to them).

268. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 637 (2002).

video games due to their technological savvy, minors do not possess any sort of contractual expertise to comprehend what terms and conditions they have just been bound to.

### *C. Pending Doom for the Infancy Doctrine*

The *Epic Games* case is currently pending in a North Carolina district court.[269] The parties are going back and forth submitting supporting documents, but the court has not set a trial date at this point. One cannot overstate the importance of this case, as this case could open the flood gates for litigation and continue the demise of the infancy doctrine. The *iParadigms* case exhibits that more state courts are willing to narrow the infancy doctrine's protections.[270] Will North Carolina be the next state to follow the Fourth Circuit's opinion in *iParadigms*?[271] If North Carolina is the next state, will Texas follow North Carolina's lead?[272] These questions should not be left in the fold to be decided in the future, but should be decided now before this wave of litigation hits full speed.

Epic Games is wholly disinterested in preserving the infancy doctrine. Epic Games cannot disclaim that the legal actions taken against Rogers in North Carolina are unreasonable. A similar situation recently occurred where a teenage Fortnite player was posting leaks and Fortnite updates prior to the updates taking effect in the game.[273] In essence, this player was cheating in the game by obtaining a competitive advantage comparatively to other players who were unable to reap the benefits of the game updates.[274] Remember, these competitive advantages include weapons and other virtual property that some can obtain through these leaks or cheat codes.[275] This teenager's actions had a much higher chance of lost profits for Epic Games than Rogers's actions. This teenager would post the leaks on his Twitter page that had nearly 243,000 followers.[276] That means that nearly 243,000 Fortnite players could have a competitive advantage in the game.

Nearly 243,000 players being able to obtain virtual property before others, and potentially without paying for the property, have all surely breached Fortnite's EULA and TOS just as Rogers did. The teenager who

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269. Epic Games v. Rogers, No. 5:17-CV-00534 (E.D. N.C. filed Oct. 23, 2017).

270. *See* A.V. v. iParadigms, L.L.C., 544 F. Supp. 2d 473, 481 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom.* A.V. *ex rel.* Vanderhye v. iParadigms, L.L.C., 562 F.3d 630 (4th Cir. 2009).

271. *See id.*

272. *See supra* text accompanying notes 150–151 (explaining that the potential impact on Texas is significant because Texas has historically disallowed minors to accept the benefits of a contract while escaping liability).

273. *See* Emma Kent, *Epic Legal Threat Silences Prolific Fortnite Leaker*, EUROGAMER (Dec. 15, 2018), https://www.eurogamer.net/articles/2018-12-14-epic-forces-closure-of-popular-fortnite-leaks-account-with-legal-threat.

274. *See id.*

275. *See supra* Part II.B (explaining the impacts of cheat codes).

276. *See* Kent, *supra* note 273.

operates the Twitter page has surely breached the terms and conditions by allowing 243,000 players to obtain this information. However, in a case as extreme as this one, Epic Games threatened legal action but did not actually file suit.[277] Epic Games sent a letter to the teenager stating that he had "spoiled the game for millions of . . . people who play and/or watch Fortnite, and negatively impact[ed] those who work hard to create and update Fortnite."[278] In addition, Epic Games demanded that the teenager "delete his social media accounts and remove 'any unauthorized Epic-related content.'"[279] However, while a demand letter was sent to the teenager, no further legal action was taken.[280]

Only sending a demand letter when 243,000 people have seen leaks regarding a game is a perfect example that Epic Games has overstepped its bounds. Banning a player from continuing to play the game and even requiring the player to delete his or her social media account is practical. Thus, Epic's attempt to sue a fourteen-year-old minor for $150,000—a sum which could easily bankrupt families across the United States—is not only impractical, but it is also malevolent, and it represents the pending doom for the infancy doctrine.

## VII. PROPOSED SOLUTIONS FOR THE INFANCY DOCTRINE'S FLAWS

This Comment has reviewed the constantly evolving landscape of contract law due to technological advances and the effect that it has had on minors' contract rights. The previous and current attempts by Epic Games to reduce minors' rights could be enormous and would essentially render the infancy doctrine negligible. This Comment will propose three solutions to cure the current defects with the infancy doctrine: (1) courts should follow the holding in *PAK Foods* that allows minors to disaffirm provisions of contracts that are detrimental, while allowing them to enforce the provisions of contracts that are beneficial;[281] (2) if courts continue to enforce online contracts against minors, courts should abstain from awarding monetary damages and should allow injunctive relief as the only legal remedy; and (3) the Texas Legislature should enact a statute specifically communicating minors' rights to disaffirm contracts with respect to both tangible and intangible goods to prevent any further inconsistent holdings in the common law.

277. *See id.*
278. *Id.*
279. *Id.*
280. *See id.*
281. PAK Foods Hous., L.L.C. v. Garcia, 433 S.W.3d 171, 173–74 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd).

### *A. Texas Should PAK the Courts*

The Houston Court of Appeal's interpretation of the infancy doctrine in the *PAK Foods* case is the correct interpretation and it should be ratified by the Texas Supreme Court. In that case, the court held that a minor may disaffirm a contract "regardless of whether the original contract was either beneficial or injurious to her."[282] Although there was precedent from the Texas Supreme Court's holding in *Dairyland*, the court of appeals in *PAK Foods* reverted back to the main purpose of the infancy doctrine: Protection from (1) adults who may not be acting in the best interest of the minors, and (2) the minor's own poor judgment.[283] The court's interpretation also aligns with the proponents who seek to protect what legal protections still exist for minors under the infancy doctrine. The court's holding in *PAK Foods* belongs in today's modern world that is dominated by online contracts such as EULAs and TOS. One scholar reinforces this idea in saying that "while a minor seeking to void an online TOS will no longer be allowed to use the service, *the fact that the minor has benefited from the service in the past is not grounds to prevent voiding the contract*."[284]

The same policy reasons underlie allowing minors to disaffirm an online contract such as the Epic Games's EULA when they have benefited from the contract and allowing minors to disaffirm the contract when the consideration has depreciated in value or cannot be returned. Since the early 1900s, Texas courts have followed the general rule that a minor can disaffirm a contract while retaining the benefits of the contract.[285] For example, an equipment dealer entered into a contract with a minor for the sale of equipment.[286] After taking possession of it, the minor damaged the equipment.[287] The court held that the minor could return the damaged equipment and get his money back because the damage was not the result of tortious conduct committed by the minor, nor did the minor engage in fraud.[288]

The Texas courts followed this same line of reasoning in *Hogue v. Wilkinson*.[289] In that case, the minor purchased chinchillas.[290] Several years later, the minor sought to disaffirm the contract even though several of the chinchillas had died, which made it impossible for the minor to return all consideration he had received.[291] The court still permitted the minor to

282. *Id.* at 177.

283. *See* Dairyland Cty. Mut. Ins. Co. v. Roman, 498 S.W.2d 154 (Tex. 1973); 43 C.J.S. *Infants* § 210 (2011); Preston & Crowther, *supra* note 111.

284. Preston, *supra* note 8, at 233 (emphasis added).

285. *See, e.g.*, Rutherford v. Hughes, 228 S.W.2d 909, 912 (Tex. App.—Amarillo 1950, no writ).

286. *Id.*

287. *Id.*

288. *Id.*

289. Hogue v. Wilkinson, 291 S.W.2d 750, 753 (Tex. App.—Texarkana 1956, no writ).

290. *Id.* at 751.

291. *Id.* at 752.

recover the entire purchase price, however, holding that a minor seeking to disaffirm a contract for personal property is not liable for depreciation in value unless the seller establishes the value decrease arose from the minor's tortious conduct.[292]

The fact that the consideration could not be returned is highly critical because the non-return of consideration applies to intangible property. Intangible property such as an in-game purchase cannot be returned. Similar to the court in *Hogue*, Texas courts should allow minors to disaffirm their contracts even if the consideration cannot be returned. Especially in cases like *Epic Games* when the minor cannot return the consideration due to its intangible properties, courts should not disallow disaffirmance because the minor was able to retain the benefits of the contract (the intangible property) while allowing disaffirmance of the harmful provisions of the contract.

Thus, while Texas deviated from the common law principle that minors can disaffirm contracts notwithstanding that they received some benefit from the contract, the court in *PAK Foods* returned to the proper common law interpretation.

### *B. Injunctive Relief Is the Only Relief*

If the Texas Supreme Court defers to its holding in *Dairyland* and does not allow a minor to disaffirm an online contract because it would be considered retaining the benefit of the contract while escaping contractual liability, the only legal remedy that should be allowable for adult contracting parties is injunctive relief. The purpose of this Comment is not for the advocation of a no-punishment policy for minors that violate online contracts such as cheating in a video game. The purpose of this Comment, however, is to advocate for an adult contracting party's remedy to be limited to injunctive relief. Seeking monetary damages in hundreds of thousands of dollars is simply despicable.

This Comment is not meant to overlook the fact that some minors are certainly acting in bad faith when they enter into online contracts. For instance, in the case of *Epic Games*, one could argue that Rogers did act in bad faith by continuing to make Fortnite profiles after Epic Games deleted his previous accounts for utilizing the cheat codes.[293] Bad faith can be defined as an intentionally dishonest act with the purpose of not fulfilling legal contractual obligations or entering into a contract with no intention to fulfill one's obligations.[294]

The only bad faith involved in a case such as *Epic Games* is on the part of the game developers. The objective of this Comment is to highlight the

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292. *Id.*
293. *See* Complaint, *supra* note 60, at 10.
294. *See Bad Faith*, BLACK'S LAW DICTIONARY (10th ed. 2014).

extreme and despicable actions taken by Epic Games, and the potential for many other developers following in Epic's footsteps. Using cheat codes to gain unfair advantages in video games, just like most other things, is and will always be wrongful conduct.[295] However, it is important to remember that this wrongful conduct is being committed by children. The law is supposed to provide a safety net for children.[296] How is the law protecting minors when it allows developers, who gross over $3 billion from a single game each year, to recover $150,000 from a child?

The proper legal remedy for breach of an online contract by a minor should be injunctive relief. Seeking injunctive relief or permanently banning a player's IP address from utilizing the website or game content is an equitable form of relief for both parties. Developers already currently possess the ability to permanently ban a player's IP address from accessing any game content.[297] Developers, like social media moderators, can also track the banned account to new accounts to make sure the user stays permanently banned.[298] If the developer does not want to take on this responsibility personally, they could involve the judicial system and seek a permanent injunction against the player.

Either of these options would provide game developers with adequate protections by prohibiting players from using cheat codes in the game, and it would also provide minors with adequate protection by disallowing video game developer's attempt to bankrupt minors' families due to negligent, yet naïve acts. Banning a minor for life from playing a game or accessing a website may seem like a slap on the wrist. Minors may consider something such as Facebook or Fortnite irreplaceable.[299] Minors are obsessed with Fortnite.[300] Some play the game as a means of preventing ostracization by their friends because everyone is playing the game.[301] Minors feel pressured to not only play the game with their friends but also to play the game well.[302] Thus, the risk of forever being cut off from the minors' favorite social media network or video game may loom larger than submitting to the TOS.

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295. *See supra* text accompanying notes 104–107 (explaining that Rogers did not think he should be held accountable for his actions because he was not trying to cheat to ruin the game, but because he thought it was fun; Rogers clearly did not understand the contractual liability for breaching Epic Games's EULA and TOS).

296. *See* Preston & Crowther, *supra* note 111, at 49.

297. Sarah Perez, *Twitter Adds More Anti-Abuse Measures Focused on Banning Accounts, Silencing Bullying*, TECH CRUNCH (Mar. 1, 2017, 8:00 AM), https://techcrunch.com/2017/03/01/twitter-adds-more-anti-abuse-measures-focused-on-banning-accounts-silencing-bullying/.

298. *Id.*

299. *See* Preston & Crowther, *supra* note 111, at 69.

300. *See* Sam Wolfson, *Parents Are Paying Tutors to Stop Their Kids Getting Owned at Fortnite*, GUARDIAN (Aug. 2, 2018, 11:55 AM), https://www.theguardian.com/games/2018/aug/02/fortnite-tutorial-how-to-be-better-shooting-classes-parents-paying-teachers.

301. *See id.*

302. *See id.*

### *C. Texas Legislature Gets Involved After Thirty-Four-Year Silence*

The common law has sufficiently diluted the infancy doctrine over time, which is partly due to the lack of state legislatures' willingness to step in and statutorily protect minors.[303] A statute passed by the Texas Legislature specifying minors' rights to disaffirm contracts with respect to tangible and intangible goods is yet another way to cure the deficiencies and inconsistencies with the infancy doctrine. In Texas, there are currently no statutes on point codifying Texas courts' interpretations of the infancy doctrine or the applicability of the doctrine to both tangible and intangible property, with the sole exception being § 129.001 of the Texas Civil Practice and Remedies Code, which specifies the age of majority as eighteen years old.[304] If the Texas Legislature enacted this statute, all minors within the state would be bound by the rights and limitations specified in the statute. Minors have no vested right to be free from legislatively mandated limitations on the right to contract.[305] State legislatures have the right and the power to abrogate or remove minors' disability to contract.[306] "The right to disaffirm a contract under certain circumstances may also be eliminated by virtue of statute."[307]

A general statute would remove confusion from different courts' interpretations of the infancy doctrine. Also, other state legislatures may look to Texas's statute as guidance and a foundation to enact a similar statute in their respective states. Texas currently has the second largest economy in the United States based on gross domestic product[308] and population.[309] Because Texas represents such a large portion of the national economy, many states that have encountered the problems like North Carolina is currently facing in *Epic Games* may elect to follow Texas's lead.

Unfortunately at this time, no states have enacted statutes that provide a concrete explanation of the infancy doctrine's applicability, so there is no model statute for Texas to follow in drafting a statute. The statute could be incorporated into the Civil Practice and Remedies Code near § 129.001, which defines the age of majority in Texas.[310] Essentially, the statute would codify the holding from the Texas appellate court in *PAK Foods*, which

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303. *See, e.g.*, *supra* notes 131–139 and accompanying text (discussing how Texas limited the infancy doctrine by prohibiting minors from disaffirming contracts when the received a benefit).

304. TEX. CIV. PRAC. & REM. CODE ANN. § 129.001; *see supra* text accompanying note 185 (explaining that the Texas Legislature has not passed any statutes regarding the infancy doctrine since the 1985 statute addressing the age of majority in Texas).

305. 43 C.J.S. *Infants* § 297 (2018).

306. *Id.*

307. *Id.*

308. *See* Jeff Desjardins, *This Map Compares the Size of State Economies with Entire Countries*, VISUAL CAPITALIST (May 30, 2018), https://www.visualcapitalist.com/map-state-economies-countries/.

309. *See U.S. States – Ranked by Population 2019*, WORLD POPULATION REV., http://worldpopulationreview.com/states/ (last visited Nov. 4, 2019).

310. TEX. CIV. PRAC. & REM. CODE ANN. § 129.001.

allows a minor to disaffirm a contract in situations where the minor has received a benefit.[311]

The most important provision of the proposed statute would reference the applicability of online contracts and intangible property. The statute would allow minors to disaffirm the contract, even if the contract was for intangible property such as virtual property purchased in video games for real cash. In accordance with the proper legal remedy discussed above, the statute would specify that where an online contract for intangible property is involved, if the consideration cannot be returned, the adult contracting party may seek injunctive relief against the minor to prevent future use of the website, video game, etc.[312] By seeking injunctive relief, both minors and their parents or guardians would be informed of the minors' online activities. This could help prevent minors from continuing to use the online service. The proposed statute represents an equitable result for both adults and minors by mitigating the lost profits suffered by the adult contracting party and by prohibiting minors from utilizing the service any further without the possibility of monetary damages.

## VIII. CONCLUSION

Minors have historically been seen as infants deserving protection from adults seeking to take advantage of their vulnerability, immaturity, and lower cognitive abilities—rather than as adults—in making economic and legal decisions.[313] Although there is some case law discussing the interplay of minors' rights to disaffirm online contracts, the subject matter is still relatively new.[314]

Minors should be allowed to use the benefits derived in an online contract. The fact that some minors now possess exceptional computer savvy compared to the past should not deprive minors of the right to void an EULA or TOS. Minors utilizing the infancy doctrine for its express purposes are not acting in bad faith. There will be some casualties when the doctrine is used. In fact, both conniving and innocent adults that deal with minors could ultimately pay the price. The entire purpose of the infancy doctrine will be undermined if courts do not start steering adults away from hard bargaining with minors through the use of online contracts.

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311. *See* PAK Foods Hous., L.L.C. v. Garcia, 433 S.W.3d 171, 177 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd).

312. *See supra* text accompanying notes 284–297 (explaining that the only legal remedy available to developers should be injunctive relief to prevent bankrupting families for their children's naïve acts).

313. *See supra* notes 112–115 and accompanying text (discussing how society has traditionally protected minors).

314. *See, e.g.*, A.V. v. iParadigms, L.L.C., 544 F. Supp. 2d 473, 480 (E.D. Va. 2008).

The sheer number of minors that occupy online markets, and specifically video-game online markets,[315] requires a meaningful inquiry into the policies of the infancy doctrine. But this inquiry should provide greater protections for minors, not a restriction on minors' abilities to disaffirm by the use of the infancy doctrine. As noted above, a large portion of contract abuse stems from developers' and businesses' usage of EULA and TOS contracts (adhesion contracts) that disallow a consumer contracting party from any contract modification or negotiation.[316] These adhesion contracts only work to encourage thoughtless and impulsive behavior, which is a problem that is particularly troubling for teens who have been statistically proven to be more prone to giving into their impulses than adults.[317] Thus, while contract avoidance by disaffirmance under the infancy doctrine presents a significant threat to businesses with online markets that rely on minors—such as video game developers—it will continue to be applied inconsistently in cyberspace until legislatures or courts thoughtfully rewrite the doctrine.

Certainly, the infancy doctrine may become an unmanageable factor in digital market economics. But without serious consideration of historical values and long-term implications, dramatic changes ought not occur in an arena in which the temptation to commit contract abuses is apparent or in a judicial context in which consumer protection is undervalued. At least with respect to EULAs and TOS, the infancy doctrine should be enforced—and perhaps publicized to encourage its use. The purpose of the infancy doctrine is to protect the rights of minors due to their naivety.[318] The law should return to this greater protection that has been historically provided for minors. Even in cases where a minor has breached a contract, such as Rogers in the *Epic Games* case,[319] the law should provide protection because minors are unaware of the contractual liabilities. The historical principles of the infancy doctrine made clear that "[a] person who deals with an infant does so at his or her peril regardless of whether such person has actual or constructive notice of the infant's disability."[320] Although the recommendations proposed in this Comment may ultimately discourage online businesses from contracting with minors, discouraging adults from contracting with minors is precisely one of the purposes of the infancy doctrine.[321]

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315. *See supra* notes 1–4 and accompanying text (discussing percentages of teens online).

316. *See supra* notes 191–195 and accompanying text (discussing usage of EULAs and TOS agreements).

317. *See supra* notes 230–231 and accompanying text (discussing how children are impulsive risk takers).

318. *See* Ferguson v. Hous., E. & W. Tex. Ry. Co., 11 S.W. 347, 347 (Tex. 1889).

319. Epic Games, Inc. v. Roger, No. 5:17-CV-00534 (E.D. N.C., filed Oct. 23, 2017).

320. 43 C.J.S. *Infants* § 295 (2018).

321. *See id.* § 210.