SAMUEL M. DAVIS

CHILDREN'S RIGHTS UNDER THE LAW

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(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

To my grandchildren, Jeremiah Davis Weathersbee and
Mary Carolyn Elizabeth Weathersbee

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Contents

Preface and Acknowledgments

A seven-year-old boy enters a neighbor's greenhouse, destroying several priceless orchids and other plants that are part of the neighbor's collection of rare plants. He also damages the glass as well as pots and earthenware. Can he be held civilly liable in a court for the damages? Can his parents be held liable?

The parents of a 14-year-old girl with limited English-speaking ability, along with numerous parents of other similarly situated children, bring a lawsuit seeking to have achievement and other tests administered in a language other than English. Test scores are critical to the children's placement as well as for funding purposes. What are their chances of success?

A 13-year-old boy becomes angry at another neighborhood child while playing in the neighbor's yard. He goes into his house, gets his father's high-powered rifle, aims it out the window, and shoots and kills his friend. Will his case be handled in juvenile court or criminal court? If he is convicted of first-degree murder in criminal court, can he be sentenced to death or life without possibility of parole?

A 13-year-old middle school student is implicated by a "friend" who alleges that the 13-year-old is selling prescription drugs at school. The "friend," who is trying to take the heat off herself, further alleges that drugs can be found in the child's backpack. The principal calls the young girl into his office. Can he search her backpack? Can he search her clothing? Can he send her into another room to be strip-searched by a female administrator or teacher? Will her parents have any recourse?

The parents of a 12-year-old girl are attempting to deal with their unruly daughter. As punishment for her disobedience, they confine her to a room in their basement, where she is locked in a small room with no windows and is occasionally given food and drink. She is kept there for the weekend. Does their action constitute abuse, allowing the state to step in and take temporary custody of their child?

These and many other issues are discussed and answered in this book. It is a book about "children's rights," although it is impossible to examine children's rights in isolation without examining the respective roles played by parents and the state. The study of "rights" is the study of power, control, and decision-making. To the extent children have rights, they have the right to make choices for themselves and to exercise control over their lives. When children do not have certain rights, it is usually because someone else, either parents or the state, has power of control—and, therefore, decision-making authority—over them. This book is an effort to identify and

examine the various interests that favor decision-making by parents, the state, or children themselves. As such, it is a study of the very delicate relationship between the family and the state in modern society.

No undertaking of this nature is ever completed without the help of many persons. I wish to thank my research assistants who provided invaluable aid and helpful advice: Bette Bradley, Catie Hester; Catherine Anne Daley, and Fran Murphy. I also thank my administrative assistant, Connie Lamb, who helped with the manuscript and preparation of the bibliography. I also thank my editors, Jessica Picone, Maria Pucci and especially Pushpa Giri, who guided me through the editing process. I will always be grateful to Chris Collins for giving me this opportunity. I thank Professor Barry Feld, who read the manuscript and offered some very helpful suggestions. And finally, I thank my family, who sacrificed their time and lent personal support when it was most needed.

Samuel M. Davis
Oxford, Mississippi

Children's Rights Under the Law

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1 The Place of Children in the Law

. . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

. . .

. . . Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions. . . . Parents can and must make those judgments.

–Chief Justice Warren E. Burger
Parham v. J.R.
442 U.S. 584, 602-3 (1979)

This book is primarily about children's rights. The word *rights* is troublesome enough, and the book itself is testimony to the numerous problems associated with the term. The word *children* presents conceptual difficulties of its own. Children have been variously referred to in the law as infants, minors, adolescents, youths, juveniles, and the like. Sometimes particular terms are zealously touted; for example, a thousand-page casebook on juvenile justice was criticized for not including youth or adolescent in its subject matter index.[1] The terms *children* and *child* are adopted throughout this book for purposes of consistency and for no better reason than that the author is

[1] Franklin E. Zimring, The Changing Legal World of Adolescence xii & n.6 (1982) [hereinafter Zimring]. The book criticized was Sanford Fox, Cases and Materials on Modern Juvenile Justice (2d ed. 1981).

comfortable with these terms, which sound more humanistic and less clinical than the others.[2]

This is more than a book about children's rights, however. In a broader sense, as the title suggests, it is an examination of the relationships existing between children, their parents, and the state. Close observation of those relationships reveals that on a day-to-day, practical, functional basis they present a study of authority, a search for an answer to the question of who speaks for the child: parents, the state, or the child himself or herself.

The complexity of the relationships does not lend itself to any single, simple answer. Depending on the circumstances and the context, children sometimes decide certain matters for themselves, especially if they are emancipated, that is, free from parental authority and living independently.[3] In other contexts, the parents might make decisions for a child, for example, decisions regarding medical treatment[4] or commitment to a mental institution.[5]

In still other contexts, the state might make decisions on the child's behalf, as on the question of adequate parenting[6] or even regarding medical treatment, especially in life-threatening situations.[7]

Unquestionably, young people frequently are subject to differential treatment whether they are labeled children or adults. In keeping with the current trend, for most purposes in this book, anyone under 18 years of age is considered a child and anyone 18 years of age or older is considered an adult.[8] Yet, even some adults as so defined are denied certain rights or privileges; for example, in some states one must be 21 in order to make a will[9] or 19 or older to purchase alcoholic beverages.[10] Such provisions are evidence of lingering uncertainty over the wisdom of lowering the age of majority from 21 to 18 years of age. In contrast, the Juvenile Justice Standards Relating to Rights of Minors propose adoption of age 18 as the age of majority for all purposes. Anything less, the proponents claim, is both inconsistent with the notion

[2] In his book, Zimring notes that lawyers have a language all their own that does not correspond to terminology found in social science literature. It was in this context that he criticized omission of adolescent or youth from the casebook mentioned in note l. Zimring, *supra* note 1, at xi–xiii.

[3] See the section on Emancipation in Chapter 2.

[4] See the material on medical decision-making in Chapter 4.

[5] See the discussion of Parham v. J.R., 442 U.S. 584 (1979), in Chapter 3.

[6] See Chapter 8.

[7] See the material on medical decision-making in Chapter 4.

[8] These definitions, particularly the use of age eighteen as a dividing line, are discussed generally in, Juvenile Justice Standards Relating to Rights of Minors Standard 1.1 and Commentary 17–20 (Institute of Judicial Administration/American Bar Association 1980). Specific applications are discussed in the sections on testamentary transfer of property and emancipation in Chapter 3.

[9] See the section on testamentary transfer of property in Chapter 2.

[10] The experience in Michigan, as well as the problem generally of setting a legal drinking age, is recounted in Zimring, *supra* note 1, at 3–7. During the Reagan presidency, federal legislation was enacted that sought to coerce states into raising the legal drinking age to 21 by withholding up to 10 percent of federal highway construction funds from states that did not enact such legislation by October 1, 1987. Some 23 states had previously raised the legal drinking age to 21. New York Times, July 18, 1984, A15, col. 1. Some whimsically proposed raising the age to 37 or 38 or even 40. And one writer proposed a maximum drinking age of 50. Arnold Benson, *Hic*, New York Times, July 2, 1984, A15, col. 2.

that an 18-year-old is capable of assuming adult responsibilities, and demeaning to persons who for most purposes are regarded as adults.[11]

Certainly if one is regarded as a child, differential treatment is common. For most purposes, children are treated differently from adults, and some children are treated differently from other children. Thus, in private law, children are viewed as lacking the capacity to enter into a binding contract[12] or to make a will,[13] and as lacking freedom to work at certain occupations.[14] Emancipated children, however, are treated as adults for some purposes and therefore can make decisions for themselves and engage in certain activities that are denied to children generally.[15]

Where the Constitution has a role to play, children have the right to make some decisions for themselves. Thus, a state cannot impose an absolute requirement of parental consent for a child to have an abortion.[16] Indeed, a mature minor[17] can decide for herself whether to have an abortion, and even if immature, she will be allowed to obtain an abortion if the court determines that the abortion would be in her best interests.[18]

Professor Frank Zimring has argued that no one single age (such as 18) should be used in determining such matters as capacity or responsibility. Rather, he argues, the age should vary depending on the attribute of adulthood under consideration. He names three such attributes that often are associated with the age of majority: liberty, entitlement, and responsibility. Liberty entails the same exercise of free choice as far as the state is concerned, enjoyed by adults generally; for example, the right to make decisions about medical care. Entitlements are "special opportunities the state might wish to provide only to those who have not yet reached adulthood," such as the Job Corps or the old Civilian Conservation Corps (CCC). Responsibility refers to one's accountability for misconduct under the criminal and civil law, as well as the burden of supporting oneself. He suggests that the age of majority for liberty be 18 and for entitlement and responsibility 21.[19]

Professor Zimring would not require that such determinations be wholly age-specific, however. He prefers to create a presumption that, depending on the purpose, one must have reached either age 18 or age 21 before he or she is free to make a choice, entitled to some benefit or opportunity, or responsible for himself or herself. The argument could be made in individual cases for a lower or higher age. The presumption should be

[11] Juvenile Justice Standards Relating to Rights of Minors Standard 1.1 and Commentary 19 (Institute of Judicial Administration/American Bar Association 1980).

[12] See the section on Contracts in Chapter 2.

[13] See the section on Testamentary Transfer of Property in Chapter 2.

[14] See the section on regulation of Child Employment in Chapter 2.

[15] See the section on Emancipation in Chapter 2.

[16] Planned Parenthood v. Danforth, 428 U.S. 52, 72–75 (1976). The subject of abortion decision-making for minors is covered in Chapter 3 and to some extent in Chapter 4.

[17] See note 2.

[18] Bellotti v. Baird (II), 443 U.S. 622, 642–44 (1979). These rights were confirmed later in Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 416 (1983), and City of Akron v. Akron Center for Reproductive Health, 462 U.S. 476 (1983). These cases and other Supreme Court decisions on abortion rights are discussed in the section on abortion decision-making for minors in Chapter 3 and in the material on medical decision-making in general in Chapter 4.

[19] Zimring, *supra* note 1, at 111.

a strong one, he argues, but deciding whether it has been overcome in individual cases would force us to articulate, examine, and constantly rethink the policy reasons underlying such age requirements.[20]

Age, in this sense, is being used as a proxy for the real, underlying issue, namely, the question of who decides for children. There, the law is caught in a bind between competing interests: the desire to protect children from others, from harmful situations, and from their own improvidence, and the desire to give children as much autonomy as they can bear, as soon as they can bear it.[21]

The nature of these competing interests constitutes one of the major themes of this book. Chapter 2 examines the conflicting views of children and their place in the law as developed in various areas of private law long before any aspect of family law came to be measured by a constitutional yardstick. Chapter 3 presents a broad constitutional perspective of the authoritative roles of children, parents, and the state as revealed in decisions of the United States Supreme Court. From there, the book explores specific aspects of children's rights, including the right to life, or medical decision-making for children (Chapter 4), the right to liberty, or personal freedom of children (Chapter 5), the right to property, or protected entitlements of children (Chapter 6), children and education (Chapter 7), protection of children from inadequate parenting (Chapter 8), the Supreme Court and the juvenile justice system (Chapter 9), differential treatment of children and adults accused of criminal misconduct (Chapter 10), the adjudicatory process in juvenile court (Chapter 11), and the dispositional process in juvenile court (Chapter 12). Finally, Chapter 13 draws some conclusions from all of the above, particularly whether the prospect is likely that the law, and especially the United States Supreme Court, is capable of developing a coherent, consistent policy with respect to children's rights.

[20] *Id.* at 111–12. An excellent review of Zimring's book is Bruce Hafen, *The Learning Years: A Review of The Changing Legal World of Adolescence*, 81 Mich. L. Rev. 1045 (1983) [hereinafter Hafen].

[21] Some have argued in favor of virtually total autonomy for all children. *See, e.g.*, Richard Evans Farson, Birthrights (1974); John Holt, Escape from Childhood (1974). Others have argued in favor of increased parental control. *See, e.g.*, Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy*, 86 Yale L.J. 645 (1977). Still others have argued for a moderate approach somewhere in between. *See, e.g.*, Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations about Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. Rev. 605.

In addition to the above works, a number of excellent books and articles have been written on the subject of children's rights generally and on particular aspects of children's rights. Among them are Samuel M. Davis, Walter Wadlington, Charles H. Whitebread, and Elizabeth Scott, Children in the Legal System (4th ed. 2009); Martin R. Gardner and Anne Proffitt Dupre, Children and the Law (2d ed. 2006); Laurence D. Houlgate, The Child and the State: A Normative Theory of Juvenile Rights (1980); Robert H. Mnookin and D. Kelly Weisberg, Child, Family and State (5th ed. 2005): Zimring, *supra* note 1; Robert Batey, *The Rights of Adolescents*, 23 Wm. & Mary L. Rev. 363 (1982); Henry H. Foster Jr., and Doris Jonas Freed, *A Bill of Rights for Children*, 6 Fam. L.Q. 343 (1972); Bruce Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463 (1983); Hafen, *supra* note 20; Irving R. Kaufman, *Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of Law*, 52 N.Y.U. L. Rev. 1015 (1977); Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C.D. L. Rev. 255 (1979).

2 Private Law and Children's Rights

A stranger must think it strange that a minor in certain cases may be liable for his torts and responsible for his crimes and yet is not bound by his contracts. Of course there are exceptions and qualifications to this general proposition. However, the common-law conception that a minor does not possess the discretion and experience of adults and therefore must be protected from his contractual follies generally holds sway today.

Chief Justice Frank R. Kenison
–Porter v. Wilson
106 N.H. 270, 271, 209 A.2d 730, 731(1965)

INTRODUCTION

In the private law context, law has assumed sometimes confusing and often conflicting attitudes toward children. In the areas of contract and property law, for example, the law traditionally has viewed children as being incapable of entering into binding contracts or disposing of their property and in need of protection from more experienced adults. The law, therefore, has assumed a protective posture in dealing with children in these areas. On the other hand, in the area of tort law, children traditionally have been regarded as liable for their torts where they have caused injury to others or property damage. In contrast to the protective role assumed by the law in other areas, the law here has accorded children a degree of autonomy and has held them accountable for their actions.

These contrasting attitudes of the law toward children, from one area of private law to the next, probably are the result of independent development of each area of law without any thought given to the status of children generally under the law. Regardless of the reasons that conflicting attitudes have developed, the fact undeniably remains that such conflicting attitudes exist. These attitudes are presented and discussed in the

sections that follow. The chapter culminates with a discussion of the doctrine of emancipation that attempts to resolve some of the inconsistencies in the law's attitudes toward children; emancipation allows some children, at least, to decide some matters for themselves as though they were adults.

TORTS

In 1863, in the case of *Huchting v. Engel*,[1] the Wisconsin Supreme Court held that a six-year-old child was liable in trespass for damages for "breaking and entering the plaintiff's premises, and breaking down and destroying his strawberries and flowers therein standing and growing"—despite the claim that the child was "of such tender years that a suit at law could not be maintained against him." One might suppose that because of the date of the decision, it represents an antiquated view no longer followed today. In truth, however, the proposition stated by the Wisconsin court—that children can be held liable for their torts—is as valid today as it was in 1863.[2]

A word of caution is in order. The rule is simply that children—like adults—can be held liable for their torts. Put another way, children as a class are not immune from liability solely because of their age.

As with virtually every rule, some qualification is in order. Thus, although children do not enjoy absolute immunity as such, a particular child may escape liability because he lacks the mental state required for liability. For example, because of his age, inexperience, and limited intelligence, he may be incapable of forming the intent required for commission of an intentional tort such as battery, and he may be incapable of negligence as well in that he cannot comprehend risks of which an adult would—or should—be aware.[3]

On the latter score especially—that is, where a child is alleged to have caused injury or property loss negligently—a child's immaturity and lack of experience are often taken into account. In judging whether an adult has acted negligently, the law typically employs what is referred to as the reasonable man standard—that is, the inquiry is into whether the subject exercised the sort of care exercised by the reasonable, ordinary person, or put another way, whether the reasonable, ordinary person would have been aware of the risk of which the subject was unaware.[4] Children, however, are not expected to measure up to the adult standard. Consequently, the standard for children is more subjective—that is, a child's conduct is measured against what reasonably would be expected of a child of like age, intelligence, and experience.[5]

Most of the case law on the subject has arisen in the context of cases in which children were plaintiffs and their contributory negligence was raised as a defense. Rather than

[1] 17 Wis. 230(1863).

[2] W. Page Keeton, Prosser & Keeton on Torts 1071 and cases cited in n.2 (5th ed. 1984) [hereinafter Keeton].

[3] *Id.*

[4] *Id.* at 169–70, 173–74.

[5] *Id.* at 179 and cases cited in n.47; Restatement (Second) of Torts § 283(A) (1977). For an example of judicial adoption of the Restatement's special standard for children, *see* Standard v. Shine, 278 S.C. 337, 295 S.E.2d 786 (1982). The South Carolina court reaffirmed its position more recently in Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (1997).

allow children's claims to be defeated simply because their conduct fell short of the norm when measured by adult standards, courts have preferred application of the more subjective children's standard for evaluating the reasonableness of their conduct. This view might be attributable to a protective concern—that is, that children with valid claims for personal injury or loss be able to seek redress for the injury or loss.[6]

Commentary on this issue has suggested that no good reason appears why a child's conduct should not be judged on the basis of the "children's" standard regardless of whether the child is plaintiff or defendant. Hence, the trend is toward adoption of the subjective standard both where the child is defendant in a lawsuit and where the child is plaintiff and is alleged to have been contributorily negligent.[7] The one limitation on this view is that if the child is engaged in an adult activity, such as driving a car or piloting an airplane, he is held to the adult standard.[8]

Occasionally parents are held responsible for torts committed by their children, usually as a result of statutes providing for parental responsibility. These statutes typically provide for a fairly low ceiling for damage awards against parents.[9] Louisiana's statute is by far the broadest in scope. It provides for parental liability for torts committed by children with no limitation on damages[10] and without regard to the child's ability or lack thereof to discern right from wrong.[11] Although Louisiana's parental responsibility statute is one of long standing, most of the others are more recent enactments designed to encourage increased parental supervision of children as a curb against vandalism.

Distinguishable from these statutory approaches, which flatly hold parents vicariously liable for the negligent and intentional acts of their children, is a separate theory of parental liability under which parents are held accountable for acts of their children on the ground that the parent was independently negligent in failing to supervise the child properly. For example, in *Moore v. Crumpton*,[12] in which a rape victim sued the parents of the unemancipated 17-year-old assailant, the court acknowledged that parental liability can be established where the parent (1) had the ability and opportunity to control the child, and (2) knew or should have known of reasons requiring exercise of such control.[13] In such cases, the parent is independently negligent for

[6] Keeton, *supra* note 2, at 181; Restatement (Second) of Torts § 283(A), comment a.

[7] Keeton, *supra* note 2, at 181; Restatement (Second) of Torts § 283(A), comment a. Again, for examples of cases in which courts have adopted the children's standard in both kinds of cases *see* Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (1997); Standard v. Shine, 278 S.C. 337, 295 S.E.2d 786 (1982).

[8] Keeton, *supra* note 2, at 181; Restatement (Second) of Torts § 283(A), comment c.

[9] *See, e.g.*, Ga. Code Ann. § 51-2-3 ($10,000.00); Mass. Gen. Laws Ann. ch. 231, § 85G ($5,000.00); S.C. Code Ann. § 63-5-60(A) ($5,000.00).

[10] La. Civ. Code Ann. art. 2318.

[11] Turner v. Bucher, 308 So. 2d 270 (La. 1975).

[12] 306 N.C. 618, 295 S.E.2d 436 (1982).

[13] In the *Moore* case, however, the court affirmed a summary judgment in favor of the defendant parents because the evidence established that at the time the rape occurred the parents lacked the opportunity to control the child and also had no reason to believe such control was necessary. For a more recent decision recognizing the same cause of action but affirming the trial court's dismissal

failing to exercise proper control, whereas under the parental liability statutes previously mentioned, the child's negligence (or intent) is imputed to the parent.

Another facet of tort liability affecting children is the doctrine of parent/child, or intrafamily, immunity. A novel idea when it was first announced in an 1891 decision,[14] the doctrine quickly became the established rule in this country. The immunity doctrine states that neither parent nor child is liable to the other for tortious acts committed by one against the other.[15] The chief reason offered in its favor is that it promotes family harmony, although one might question whether having an uncompensated tort in the family promotes harmony between its members, particularly in the case of an intentional, even brutal, tort.[16]

Perhaps in response to such concerns, most states have abrogated the parent/child immunity doctrine either by court decision or legislation. Today in these states, either parent or child may bring an action against the other for the other's tortious act.[17] One exception, however, is that courts have declined to recognize the right of a child to bring an action against a parent for inadequate parenting.[18] On the latter point, an interesting observation is that children generally have become more litigious in recent years, seeking to vindicate their rights not only against parents for inadequate parenting[19] and wrongful life[20] but against school authorities for infliction of excessive corporal punishment[21] and for what has been labeled educational malpractice.[22] For the most part their efforts have met with little or no success.

CONTRACTS

In contrast to the law's view that children may be held accountable for their tortious acts, the law takes a protective view of children when they enter into contractual agreements with others. The vehicle for this protective attitude is the doctrine of

of the third-party cause of action *see* LaTorre v. Genesee Management, Inc., 90 N.Y.2d 576, 687 N.E.2d 1284, 665 N.Y.S.2d 1 (1997).

[14] Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891). The parental immunity doctrine established in Hewlett v. George was abrogated in Glaskox *ex rel.* Denton v. Glaskox, 614 So. 2d 906 (Miss. 1992), but it is mentioned here for its historical significance.

[15] For a general discussion of the doctrine of parent/child immunity, *see* Keeton, *supra* note 2, at 904–7.

[16] This and other arguments are presented and discussed in *id.* at 905. In Hewlett v. George, for example, the tort complained of was false imprisonment in that the parent allegedly had caused the child to be committed to a mental institution.

[17] *See generally* Keeton, *supra* note 2, at 907 and cases and statutes cited therein at nn. 62 & 63. The first court decision to abandon parent/child immunity was Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963), but one of the leading and most influential cases is Gibson v. Gibson, 3 Cal. 3d 914,479 P.2d 648, 92 Cal. Rptr. 288 (1971).

[18] Burnette v. Wahl, 284 Or. 705, 588 P.2d 1105 (1978).

[19] *Id.*

[20] *See, e.g.*, Zepeda v. Zepeda, 41 Ill. App. 2d 240,190 N.E.2d 849 (1963).

[21] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977).

[22] *See, e.g.*, Donohue v. Copiague Union Free Sch. Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979); Peter W. v. San Francisco Unified Sch. Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

disaffirmance, which refers to the power of a child to avoid or disavow a contract into which he has entered.[23]

Suppose, for example, a child and an adult enter into a contract by which the adult agrees to sell and the child agrees to purchase an automobile. The child makes a down payment and the car is delivered to the minor on his promise to pay a stated sum per month until the purchase price is paid in full, at which time the seller agrees to deliver title to the car. The minor enjoys use of the car for a couple of months and makes his monthly payments. Everyone is happy, and the deal is proceeding as planned. Then, however, for whatever reason—defects real or imagined or pure whim—the child decides to back out of the agreement, and he returns the car and insists on return of all money paid. The law is of the view that the minor has the absolute power to disaffirm his contract; therefore, he is entitled to the return of his money and release from any further obligation.[24]

Disaffirmance is wholly the child's option. Thus, if the child stops making payments, and the seller brings suit to collect on the contract, the child may raise minority as a defense and thereby avoid the contract.[25] Moreover, if the seller decides for whatever reason that he has made a bad bargain, he is nevertheless bound by the agreement; he may not seek to have the contract set aside for the reason of the child's minority.[26]

Presumably, the basis for the doctrine is that children, because of their age and inexperience, are in need of protection from their own improvidence and from more experienced adults who might take unfair advantage of them.[27] At the same time, however, this policy is in conflict with another equally compelling policy in contract law—the policy that favors protection of the other party's expectations, which has particular application here if the adult has dealt fairly and in good faith with the child.[28]

Perhaps because of the hardship that might be imposed on an adult who has dealt fairly with the minor, there are a number of limitations either on the doctrine itself or on the consequences of its application. The most obvious limitation is that for the purpose of determining who is a child with power to disaffirm, most states have

[23] For an excellent discussion of the disaffirmance doctrine, more broad ranging than is possible here, *see* E. Allan Farnsworth, Contracts 222–24 (4th ed. 2004) [hereinafter Farnsworth]. Scholarly comment, for the most part critical of the doctrine of disaffirmance and proposing various reforms, includes Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 Hastings L.J. 1265, 1301–04 (2000); Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors "Incapacity to Contract Through the Cyberscope*, 43 Gonz. L. Rev. 239 (2007–08); Robert G. Edge, *Voidability of Minors" Contracts: a Feudal Doctrine in a Modern Economy*, 1 Ga. L. Rev. 205 (1967); W.D. Navin, Jr., *The Contracts of Minors Viewed from the Perspective of Fair Exchange*, 50 N.C. L. Rev. 517 (1972); Robert K. Regan, Note, *Restitution in Minors' Contracts in California*, 19 Hastings L.J. 1199 (1968); Thomas E. Greenwald, Note, *Contracts: Infant's Disaffirmance and Infant's Right to Void*, 52 Marq. L. Rev. 437 (1969).

[24] *See, e.g.*, Halbman v. Lemke, 99 Wis. 2d 241,298 N.W.2d 562 (1980); *see also* Dodson v. Shrader, 824 S.W.2d 545 (Tenn. 1992).

[25] Farnsworth, *supra* note 23, at 222–23.

[26] *Id.* at 222.

[27] Kiefer v. Fred Howe Motors, 39 Wis. 2d 20, 24,158 N.W.2d 288, 290 (1968).

[28] Farnsworth, *supra* note 23, at 219–20.

lowered the arbitrary age limit from 21 to 18 in keeping with lowering of the age of majority to 18 in general.[29]

Although the latter reform has the effect of removing the power of disaffirmance from persons 18 or older who enter into contracts, it does not automatically mean that on reaching the age of 18 a child immediately loses the power to disaffirm a contract into which he previously entered. To the contrary, a child retains the power of disaffirmance for a reasonable period after reaching the age of majority, and there are instances in which even a delay of several years did not affect the power of disaffirmance where the other party had not relied on the transaction.[30]

On the other hand, a child on reaching majority may, by word or conduct, ratify a contract into which he had entered previously. An example of the doctrine of ratification is found in *Jones v. Dressel.*[31] In that case, a 17-year-old boy entered into a contract for use of the defendant's skydiving services. The contract contained an exculpatory clause and a provision whereby the user of services agreed not to sue the defendant. Ten months after becoming 18, the plaintiff, now an adult, was injured in the crash of an airplane furnished by the defendant. Subsequently the plaintiff filed suit against the defendant, alleging that he had disaffirmed the contract within a reasonable time after reaching adulthood. The court, however, held that the trial court properly determined that by accepting the benefits of the contract after he reached adulthood, the plaintiff ratified the contract and was bound by its terms, including the covenant not to sue.

Another limitation on the power of disaffirmance is sometimes created by statute for children who are professional athletes or entertainers or who have contracted for "necessaries" (food, shelter, clothing, and the like). Such contracts cannot be disaffirmed, although typically, court approval of the contract is required.[32] Some proposals, such as the Juvenile Justice Standards Relating to Rights of Minors, would go even further by removing the child's power to disaffirm a contract to which the child's parent or guardian has consented in writing, a contract entered into by a child who has misrepresented his age where a reasonable person would have believed the representation, and a contract in which the child was a purchaser and is unable to return the goods to the seller in substantially original condition because they have been lost or destroyed, consumed, or given away.[33]

[29] *Id.* at 221–22.

[30] Farnsworth, *supra* note 23, at 224 & n.16, citing Cassella v. Tiberio, 150 Ohio St. 27, 80 N.E.2d 426 (1948) (eleven years).

[31] 623 P.2d 370 (Colo. 1981). But in another case, the court held that a minor, by continuing to live in an apartment for one and a half months after reaching the age of majority and continuing to pay rent, ratified the lease. Fletcher v. Marshall, 260 Ill. App. 3d 673, 632 N.E.2d 1105 (2d Dist. 1994).

[32] *See, e.g.*, Cal. Fam. Code §§ 6712, 6750, 6750 (contracts for necessaries cannot be disaffirmed; contracts for artistic or creative services and professional sports contracts cannot be disaffirmed if they have been approved by the appropriate court); N.Y. Arts & Cult. Aff. Law § 35-03 (contracts entered into by child athletes and performing artists, if approved by the court, cannot be disaffirmed).

[33] Juvenile Justice Standards Relating to Rights of Minors, Standard 6.1 (A) (Institute of Judicial Administration/American Bar Association 1980). Nevertheless, Standard 6.1(B) provides that a contract of a minor under the age of twelve is void.

An example of the latter kind of statutory limitation is found in the attempt by Brooke Shields to prevent publication of nude photographs taken when she was ten years old and working as a model. Section 51 of New York's Civil Rights Law creates a civil cause of action for use of a living person's name, portrait, or picture for advertising purposes without written consent of the person, or if the person is a child, his or her parent or guardian. Shields brought suit against the photographer who took the pictures, seeking to disaffirm the consent executed by her mother on her behalf.

The New York Court of Appeals, while conceding that under principles of common law a child has the power to disaffirm a contract, concluded that the legislature has the authority to abrogate a child's right to disaffirm and intended to do so in this instance by providing for consent on a minor's behalf by a parent or guardian.[34] Therefore, Shields was bound by the consent executed by her mother on her behalf and could not disaffirm it.

In situations in which a child unquestionably has the power to disaffirm, questions nevertheless arise with respect to the consequences resulting from the disaffirmance, especially whether and to what extent the child has to make restitution to the other party. The traditional rule is that the child need return only what remains in his possession. To return to the example used earlier, if a child contracts for the purchase of an automobile and he later disaffirms the contract, he is entitled to return of all money paid, and for his part he need return only the automobile as is. If it is wrecked, he must return the wreckage; if it is lost or totally destroyed, he has nothing to return and is under no further obligation.[35] At least one court has made a departure from the traditional rule, holding the child accountable for the value of the benefit actually received, not to exceed the price he agreed to pay for the goods.[36] The latter view is particularly compelling where the child is engaged in business for himself.[37]

Several exceptions to the traditional rule operate to mollify the hardship that otherwise would result to a party entering into a contract with a minor. One exception is that a child is liable for the reasonable value of necessaries where the parent has failed to meet the child's needs. What constitutes a "necessary" is a mixed question of fact and law; certainly it is something necessary for survival, such as food, shelter, or clothing, but could include medical care and transportation as well.[38] If the child has obtained the goods on his parent's credit and not on his own credit, then the parent, not the child, is liable.[39]

[34] Shields v. Gross, 58 N.Y.2d 338, 448 N.E.2d 108, 461 N.Y.S.2d 254 (1983).

[35] *See, e.g.*, Halbman v. Lemke, 99 Wis. 2d 241, 298 N.W.2d 562 (1980).

[36] Hall v. Butterfield, 59 N.H. 354 (1879). The court has continued to adhere to its rule. Porter v. Wilson, 106 N.H. 270, 209 A.2d 730 (1965). *See* Dodson v. Shrader, 824 S.W.2d 545 (Tenn. 1992).

[37] The New Hampshire court, for example, held in one case that a child engaged in the milk delivery business was bound by his contract with his supplier to pay for the benefits he actually received–that is, the reasonable value of the goods furnished him pursuant to his contract. Bartlett v. Bailey, 59 N.H. 408 (1879). Indeed, some states by statute declare children engaged in business bound by their contracts entered into in the course of that business. *See, e.g.*, Ga. Code Ann. § 13-3-21; Kan. Stat. Ann. § 38-103; Va. Code Ann. § 8.01-278(A).

[38] *See generally* Farnsworth, *supra* note 23, at 225–26 and cases cited therein. A car, for example, might be considered a necessity where the child uses it in the conduct of his business, school, and social activities. Rose v. Sheehan Buick, 204 So. 2d 903 (Fla. Dist. Ct. App. 1967).

[39] Farnsworth, *supra* note 23, at 226.

Another exception sometimes is allowed where the child as plaintiff seeks to recover money already paid, as opposed to where the child as defendant claims his minority as a defense. Thus, if the child receives the property and makes partial payment, then disaffirms and seeks a return of his money, he is entitled to avoid the contract but must restore the property to the seller and make restitution to the seller for the value of benefits received. The value of benefits received normally is equal to the depreciation of the property during the time the child held it, which is probably equal to the amount of payments actually made to the seller.[40]

The latter exception is based on the notion that a child's minority should be used as a shield but not as a sword.[41] As a practical result, one who furnishes goods or services to a minor for cash is entitled to restitution in full if the child disaffirms and then seeks a return of his money, whereas one who furnishes goods or services on credit is not. From the child's perspective, if he improvidently pays cash in full or a cash down payment for goods or services, he must account in full or to the extent of the down payment, but if he obtains the goods on credit, he is not held accountable.[42]

Another exception is allowed where the child has misrepresented his age. A number of courts have held that if the child misrepresents his age and the seller reasonably relies on the representation, the child is obligated to make restitution for the depreciation of the property, typically a vehicle of some kind.[43] The underlying rationale for this view is that children are liable for their torts (see the preceding section on Torts) and the child's fraudulent misrepresentation of age is a tort if the other party relied on it. Because reliance occasioned the furnishing of goods or services, and the other party suffered loss because of the child's disaffirmance, the loss is viewed as caused by the misrepresentation; restitution in full, therefore, is dictated.[44] Some courts go further, taking the position that because of his misrepresentation a child is estopped (that is, prevented under the law because of his misconduct) from asserting minority as a defense and is liable not just for restitution but on the contract itself.[45]

The fact of the limited number and scope of these exceptions bears witness to the reluctance of most courts to depart from the traditional rules allowing disaffirmance but not requiring restitution. As one court has put it, to do otherwise would "force the

[40] *See, e.g.*, Rice v. Butler, 160 N.Y. 578, 55 N.E. 275 (1899).

[41] Rice v. Butler, 160 N.Y. at 582–83, 55 N.E. at 276, quoting 2 J. Kent, Commentaries on American Law *240.

[42] Farnsworth, *supra* note 23, at 226–27.

[43] *See, e.g.*, Cain v. Coleman, 396 S.W.2d 251 (Tex. Civ. App. 1965). If there is no misrepresentation, however, the traditional rule applies that is, the seller is entitled to return of the property "as is." *See, e.g.*, Rutherford v. Hughes, 228 S.W.2d 909 (Tex. Civ. App. 1950).

[44] Farnsworth, *supra* note 23, at 227 and cases cited in nn. 21 & 22. Some courts, however, take the view that if the child has not actively misrepresented his age but rather merely has signed a standard form containing an affirmation that the purchaser is an adult, no misrepresentation has occurred and the traditional rule of restitution applies. *Id.* at 227 & n.23. Moreover, some courts reject the misrepresentation rationale altogether, reasoning that treatment of misrepresentation of age as a tort indirectly involves enforcement of the contract, which is contrary to the doctrine of disaffirmance. *Id.* at 227 & n.24.

[45] *Id.* at 227–28 & n.25.

minor to bear the cost of the very improvidence from which the infancy doctrine is supposed to protect him."[46]

REGULATION OF CHILD EMPLOYMENT

From a very early time the law has assumed a protective attitude toward children in the area of employment.[47] In response to humanitarian concerns for children working in hazardous occupations, for young children working at any occupation, for children working excessively long hours, and for conditions in the work place generally, laws regulating various aspects of child employment were enacted to protect children from physical danger and exploitation.[48]

Concerns for the welfare of children are real. Perhaps no example illustrates them so dramatically as the incident that occurred on July 23, 1982, when, during the filming of a movie at 2:30 in the morning, a helicopter fell out of control, crashing into and killing veteran actor Vic Morrow and two child actors, aged six and seven years old. Questions surfaced immediately regarding why children of that age were engaged in such an activity at that time of day.[49]

Both federal and state laws regulate child labor practices. Included in the federal Fair Labor Standards Act,[50] for example, are numerous provisions relating to child employment. The act prohibits an employer involved in interstate commerce or in production of goods for interstate commerce from engaging in "oppressive child labor" practices.[51] Violations are punishable with civil and criminal penalties.[52]

[46] Halbman v. Lemke, 99 Wis. 2d241, 251, 298 N.W.2d 562, 567 (1980). *But see* Dodson v. Shrader, 824 S.W.2d 545 (Tenn. 1992), where the court held that a minor is entitled to a return of his money, less the amount attributable to his use of, depreciation in, or negligent or intentional damage to the item purchased.

[47] The state's interests in the welfare of children generally, and in particular the welfare of children in the workplace were discussed in the Supreme Court's decision in Prince v. Massachusetts, 321 U.S. 158, 165, 168–70 (1944). Prince v. Massachusetts is presented subsequently in Chapter 3.

[48] For historical background of the child labor laws, see 1 Grace Abbott, The Child and the State (1938). A good overview of the various kinds of legislative restrictions, plus an analysis of the related issues, is Peter J. McGovern, *Children's Rights and Child Labor: Advocacy on Behalf of the Child Worker*, 78 S.D. L. Rev. 293 (1983). Other commentary includes Note, *Child Labor Laws—Time to Grow Up*, 59 Minn L. Rev. 575 (1975); Juvenile Justice Standards Relating to Rights of Minors, Standards 5.1–5.4, commentary at 87–100 (Institute of Judicial Administration/American Bar Association 1980). A more contemporary article, with a narrower focus, is Adam P. Greenberg, Note, *Reality's Kids: Are Children Who Participate on Reality Television Shows Covered under the FLSA?*, 82 S. Cal. L. Rev. 595 (2009).

[49] L.A. Times, July 24, 1982, pt. 1, at 1, col. 2. Under the Fair Labor Standards Act, 29 U.S.C.A. §§ 201 et seq., an exemption from the act's regulation of child labor is created for children employed as actors or performers in motion pictures, radio, theater, or television. 29 U.S.C.A. § 213(c)(3). Under applicable state law, however, such an exemption might not exist. *See, e.g.*, Cal. Labor Code § 1308.5.

[50] 29 U.S.C.A. §§ 201 et seq. (1938).

[51] *Id.* § 212(c).

[52] *Id.* §§ 215(a)(4), 216(a), (e).

Oppressive child labor is defined under the act as employment of children under the minimum legal age for a particular type of employment.[53]

Generally, the minimum age for employment is 16 for any occupation and between 16 and 18 for occupations that have been declared by the Secretary of Labor as posing a significant health or safety hazard to children.[54] Occupations that have been designated as hazardous or detrimental to the health or well-being of children include mining; logging and sawmilling; slaughtering, meat packing, or processing and rendering; manufacture of brick, tile, and explosives (including storage of explosives); wrecking, demolition, and shipbreaking; roofing; excavation; acting as a helper on a public road; and any occupation involving operation of certain types of machinery (for example, saws), repair of certain types of machinery (for example bakery machinery), or exposure to radioactive materials.[55]

Employment in other occupations, even those designated as hazardous agricultural occupations,[56] generally is permissible for children who are age 16 or older.[57] Children age 14 or older may be employed in some occupations, but not manufacturing or mining, where specific precautions have been taken to assure their safety.[58]

Finally, special allowance is made for children engaged in agricultural occupations. Generally, children age 14 or older may work after school hours in agricultural occupations other than those deemed hazardous (see above).[59] Also, children under age 12 may be employed in nonhazardous agricultural occupations on the family farm, and children ages 12 and 13 may be employed in nonhazardous agricultural occupations with parental consent or where the parent is employed on the same farm.[60]

An exemption from the age and occupation requirements of the act is allowed for children employed as actors or performers in motion pictures, radio, theater, or television.[61] Perhaps this exemption exists for reasons similar to those supporting special treatment of contracts entered into by children who are professional athletes or entertainers,[62] although the entertainment industry poses hazards of its own for children (as indicated by the helicopter incident mentioned above).

Individual states also have laws regulating child employment.[63] State laws apply in addition to federal laws; in fact, if state law imposes stricter requirements than those imposed under federal law, federal law adopts the state's stricter requirements.[64] Moreover, state law might apply exclusively in a situation to which federal law is

[53] *Id.* § 203(1).

[54] *Id.*

[55] 29 C.F.R. §§ 570.51–570.68.

[56] Fair Labor Standards Act, 29 U.S.C.A. § 213(c)(2). For a list of agricultural occupations deemed hazardous, see 29 C.F.R. § 570.71. For the most part they deal with operation of or exposure to certain types of machinery, exposure to certain animals, or exposure to toxic chemicals.

[57] Fair Labor Standards Act, 29 U.S.C.A. § 203(1); 29 CF.R. § 570.2(a)(1).

[58] Fair Labor Standards Act, 29 U.S.C.A. § 203(1); 29 CF.R. §§ 570.2(a)(1), 570.31–570.38.

[59] Fair Labor Standards Act, 29 U.S.C.A. § 213(c)(1)(C), (c)(2).

[60] *Id.* § 213(c)(1)(A)-(B), (c)(2).

[61] *Id.* § 213(c)(3).

[62] See discussion in the preceding section on Contracts.

[63] Because of the breadth and diversity of such laws, the reader is referred to the sources cited in note 48 *supra* for an overview of some of the state laws.

[64] Fair Labor Standards Act, 29 U.S.C.A. § 218; 29 C.F.R. §§ 570.50(a), 570.129.

inapplicable—for example, employment that does not touch on interstate commerce in any way or employment exempted from federal law but not from state law.[65]

Aside from civil penalties and criminal fines, what are the consequences, to an employer, of violation of laws regulating employment of children? The case of *Vincent v. Riggi & Sons*[66] furnishes an example. In that case, a builder hired a 13-year-old boy to mow the lawn of a newly constructed house, and the boy accidentally cut off three of his toes while mowing the lawn with his father's power mower. State law prohibited employment of children under age 14 in "any trade, business or service." The boy brought suit against the builder for his injuries, but the jury returned a verdict for the defendant, largely because the jury was not told of the employment prohibition but was told that they could consider the boy's contributory negligence.

On appeal, the New York Court of Appeals reversed, holding that the jury should have been told of the prohibition against employing children under age 14 and should not have been told that they could consider the boys contributory negligence. The policy behind child employment regulations, the court said, is to protect children from exploitation and from their own negligence. If a child's negligence could be considered against him, he would lose the very protection the statute was designed to afford.[67] Therefore, an employer of child labor, in violation of law, is liable regardless of the child's contributory negligence.

Federal and state laws also impose wage requirements for employment of children and adults, typically in the form of a minimum wage. Under current federal law, for example, the minimum wage generally is $7.25 per hour.[68] The Fair Labor Standards Act, however, provides numerous exemptions, some of which specifically apply to children and others of which by implication include children. For example, the act allows an exemption for learners, apprentices, and messengers[69] and provides that full-time students, under special circumstances, may be paid at a rate not less than 85 percent of the minimum wage for employment in retail and service establishments.[70] Moreover, newspaper carriers and persons engaged at home in making natural

[65] As an example of the latter, under federal law, an exemption is allowed for children employed as actors or performers in motion pictures, radio, theater, and television. Fair Labor Standards Act, 29 U.S.C.A. § 213(c)(3). Under California law, however, no exemption is allowed, and a special permit must be granted for child performers. Cal. Labor Code § 1308.5. California law also provides that generally children under age 16 cannot work before 7 a.m. or after 7 p.m., with hours extended somewhat during the summer and more restricted during the school year. Children between 16 and 18 years of age generally cannot work before 5 a.m. or after 10 p.m., with similar extensions for the summer and restrictions during the school year as with the younger age group. Cal. Labor Code § 1391. To return to the incident in which Vic Morrow and the two child actors were killed, see note 49 and accompanying text, apparently no violation of federal law occurred, but unless a special work permit had been issued, there did appear to be a violation of state law. In fact, an official at the time stated that normally children under age eight cannot work past 7 p.m. unless a special waiver is granted, and no such waiver had been sought. L.A. Times, July 24, 1982, pt. 1, at 1, col. 2.

[66] 30 N.Y.2d 406, 285 N.E.2d 689, 334 N.Y.S.2d 380 (1972).

[67] Compare the Wisconsin Supreme Court's similar sentiments in the contracts context in Halbman v. Lemke, 99 Wis. 2d 241, 298 N.W.2d 562 (1980).

[68] Fair Labor Standards Act, 29 U.S.C.A. § 206. The most recent increase was approved in July 2009.

[69] *Id.* § 214(a).

[70] *Id.* § 214(b).

evergreen wreaths are exempted,[71] as are some children engaged in certain agricultural occupations.[72]

Efforts have been made over the years to set a lower minimum wage for children. For example, in 1981, a subminimum wage for persons in the 16 to 19 age group was proposed. It immediately drew opposition from organized labor. One union leader dubbed the proposal the "McDonald's windfall gift amendment" because of the savings that would result for the fast-food chain, an employer of large numbers of teenage workers.[73] The proposal was not adopted. In 1984, the proposal resurfaced in a form that would have authorized a subminimum wage of $2.50 per hour (as opposed to $3.35 for adults at the time) for persons between ages 16 and 21 employed during the summer months. The National Conference of Black Mayors endorsed the proposal because of their concern over "the persistence of the tragedy of youth unemployment, particularly the problem of minority youth unemployment."[74] Substantiating their concern, Labor Department figures for April 1984 showed an unemployment rate of 19.4 percent among 16- to 19-year-old youth generally and for black youth in the same age group, a rate of 42.9 percent.[75]

Organized labor was critical of such proposals because of the fear that a lower minimum wage for youth inevitably would mean displacement of adult workers.[76] Moreover, contrary to earlier indications, fast-food chains were skeptical of a subminimum wage for youth because of speculation it would prompt a higher minimum wage for adults.[77] The 1984 proposal was also criticized because it was not comprehensive enough and failed to take into account the correlation between educational deficiencies and unemployment; what was needed, it was claimed, was a program to create opportunities and incentives "to acquire basic educational skills crucial to success in the job market."[78] Eventually, a subminimum wage was approved in 1996, prescribing a lower minimum wage for "newly hired" employees under age 20.[79]

TESTAMENTARY TRANSFER OF PROPERTY

At common law a male who had reached 14 years of age or a female of 12 years of age was deemed capable of disposing of his or her personal property by will, but a disposition of real property by will was valid only if the person had reached the age of

[71] *Id.* § 213(d).

[72] *Id.* § 213(a)(6)(B)-(D).

[73] N.Y. Times, Mar. 26, 1981, at B15, col. 5.

[74] *Id.*, April 21, 1984, § 1, at 20, col. 6.

[75] *Id.*, May 6, 1984, § 1, at 25, col. 1.

[76] *Id.*

[77] *Id.*, May 17, 1984, at B14, col. 4.

[78] Augustus F. Hawkins, *Promoting Jobs for Youth*, *id.*, June 26, 1984, at A25, col. 1. Hawkins, a Democrat from California, was chairman of the House Education and Labor Committee's subcommittee on employment opportunities.

[79] Pub. L. 104–188 § 2105(c)(4), 1996 HR 3448.

majority—that is, 21 years of age.[80] In England after the Wills Act[81] in 1837, however, the age requirement was the same—that is, 21 for disposition of both realty and personalty.[82]

In 1929 in the United States, 11 states employed different ages for disposition of personal as opposed to real property.[83] In all these states today, however, the age requirement is the same for testamentary disposition of both realty and personalty.[84]

Adoption of a common age in these states is but a part of a larger development that has taken place in recent years. With few exceptions,[85] all states and the District of Columbia have adopted 18 as the age at which one can make a valid will, regardless of the nature of the property.[86] This development probably reflects widespread acceptance of 18 as the age of majority, as well as recognition that at age 18 young people possess sufficient intelligence and understanding to dispose of real property as well as personal property.[87]

One might reasonably ask why capacity to make a will is age specific at all in the case of children. One might compare, for example, the attitude of the law toward older persons who make wills. In such a case, the law disregards age and asks only whether the person had testamentary capacity—that is, whether he had sufficient mental capacity to understand the nature of his act in making the will, to understand and recall the nature and location of his property, and to understand and recall his relations, who are the natural objects of his bounty and whose interests would be affected by the will.[88] In fact, a presumption exists that one has testamentary capacity, and the

[80] Thomas E. Atkinson, Handbook of the Law of Wills 229–30 (2d ed. 1953) [hereinafter Atkinson]; *see* Banks v. Sherrod, 52 Ala. 267 (1875). Sometimes the common law age requirement for disposition of personalty was said to be fourteen without qualification as to sex. *See* Deane v. Littlefield, 18 Mass. (1 Pick.) 239 (1822).

[81] 1 Vict. ch. 26, § 7 (1837).

[82] Atkinson, *supra* note 80, at 230.

[83] Percy Bordwell, *The Statute Law of Wills*, 14 Iowa L. Rev. 172, 179 (1929).

[84] Ala. Code § 43-8-130; Ark. Stat. Ann. § 28-25-101; Colo. Rev. Stat. § 15-11-501; Md. Code Ann., Est. & Trusts § 4-101; Mo. Ann. Stat. § 474.310; N.Y. Est. Powers & Trusts Law § 3-1.1; R.I. Gen. Laws § 33-5-2; S.C. Code Ann. § 62-2-501; Tenn. Code Ann. § 32-1-102; Va. Code Ann. §§ 64.1-46, -47; W. Va. Code §§ 41-1-1, -2.

[85] The lone exceptions are Georgia and Louisiana. In Georgia a minor fourteen or older may make a will "unless laboring under some disability." Ga. Code Ann. § 53-4-10. In Louisiana a minor 16 or older can make a will, La. Civ. Code Ann. art. 1476 (even though age of majority is 18, La. Civ. Code Ann. art. 37).

[86] In addition to the statutes set forth in note 84, see Cal. Prob. Code §§ 6100, 6220; Fla. Stat. Ann. § 732.501; Ill. Ann. Stat. ch. 1l0½, § 4-1; Mass. Gen. Laws Ann. ch. 191, § 1; Mich. Comp. Laws Ann. § 700.2501; N.J. Stat. Ann. § 3B:3-1; Ohio Rev. Code Ann. § 2107.02; Pa. Stat. Ann. tit. 20, § 2501; Tex. Prob. Code Ann. § 57.

[87] For example, in Arkansas, which formerly allowed testamentary disposition of personality at age 18 but did not allow disposition of realty until age 21, the law was changed to allow disposition of all types of property at age 18. The Committee Comment following § 28-25-101 of Arkansas Statutes Annotated explains:

> The committee feels that no distinction should be made between the right to dispose of personalty and the right to dispose of realty, and that the general intelligence and business judgment of minors has been raised substantially since the adoption of the [statutes] now in force.

[88] *See, e.g.*, *In re* Estate of Lockwood, 254 Cal. App. 2d 309, 62 Cal. Rptr. 230 (1967).

burden to show otherwise is placed on the party challenging the will.[89] As a practical matter, the presumption is difficult to overcome.[90]

Why, then, should minors, wholly for the reason of age, be regarded as incompetent to dispose of their property by will, especially since they are held liable for their torts[91] and in some instances are bound by their contracts?[92] Why should not a child who, as an entertainer or professional athlete may be bound by his contracts with other persons, also be capable of disposing of his property by testamentary gift?

In California, for example, one must be age 18 or older to make a will.[93] California law provides elsewhere, however, that an emancipated minor[94] is regarded as an adult for certain purposes, such as determining capacity to enter into a contract and, more recently, to make a will.[95] The comments following this statute indicate that because entering into a contract requires greater capacity than that required to make a will, it made little sense to allow emancipated minors to enter into binding contracts, which they could do under existing law, while denying them the right to dispose of their property by will.[96] Perhaps for similar reasons, other states allow persons under age 18 to make wills where they have been emancipated by marriage,[97] service in the armed forces or merchant marine,[98] or by judicial decree of emancipation.[99]

Children generally can inherit property from others if provision is made for them. Little protection exists, however, against outright disinheritance. Thus, if a parent wishes to disinherit a child, he need only mention the child by name in the will and disinherit him.[100] Despite disinheritance, however, children may be entitled to certain protections such as a "family allowance" during the time the estate is being

[89] *Id.*; *In re* Estate of Goetz, 253 Cal. App. 2d 107, 61 Cal. Rptr. 181 (1967); *In re* Estate of Wynne, 239 Cal. App. 2d 369, 48 Cal. Rptr. 656 (1966).

[90] For cases in which the decedent was found to have testamentary capacity despite evidence of mental infirmity and eccentric behavior, see *In re* Estate of Goetz, 253 Cal. App. 2d 107, 61 Cal. Rptr. 181 (1967); *In re* Estate of Wynne, 239 Cal. App. 2d 369, 48 Cal. Rptr. 656 (1966); *In re* Estate of Sanderson, 171 Cal. App. 2d 651, 341 P.2d 358 (1959). For a case in which the decedent was found to lack testamentary capacity, see *In re* Estate of Lockwood, 254 Cal. App. 2d 309, 62 Cal. Rptr. 230 (1967).

[91] See the section on Torts.

[92] See the section on Contracts.

[93] Cal. Prob. Code §§ 6100, 6220.

[94] Cal. Fam. Code § 7002 defines emancipated minor:

> A person under the age of 18 years is an emancipated minor if . . .
> (a) The person has entered into a valid marriage, whether or not the marriage has been dissolved.
> (b) The person is on active duty with the armed forces of the United States.
> (c) The person has received a declaration of emancipation pursuant to Section 7122.Emancipation is discussed further in a subsequent section.

[95] *Id.* § 7050.

[96] *Id.*, Law Revision Commission Comment.

[97] *See, e.g.*, Idaho Code Ann. §§ 15-1-201(15), 15-2-501; Iowa Code Ann. §§ 599.1, 633.264; Kan. Stat. Ann. §§ 38-101, 59-601 (age 16 or older and married); Neb. Rev. Stat. §§ 30-2209(26), 30-2326; N.H. Rev. Stat. Ann. § 551:1; Or. Rev. Stat. § 112.225; Tex. Prob. Code Ann. § 57.

[98] Ind. Code Ann. § 29-1-5-1; Tex. Prob. Code Ann. § 57.

[99] Kan. Stat. Ann. §§ 38-108 to -110, 59-601.

[100] An exception exists under Louisiana civil law, which contains a limitation on a decedent's power to exclude children. Depending on the number of children he leaves, they are entitled to a stated

administered,[101] temporary possession of the family residence,[102] and even continued use and enjoyment (that is, ownership) of the family residence.[103]

The most troublesome cases have been those in which the child was born after the will was made or, though born, simply was not mentioned in the will. Pretermitted children (that is, children not mentioned in the will) and afterborn children usually are entitled to a share of the parent's estate. In California, for example, with some exceptions, a pretermitted child born or adopted after execution of the will is entitled to a share of his parent's estate equal to the share he would have received if the parent had died intestate (that is, without a will).[104] The exceptions cover situations in which it appears the omission was intentional.[105] In the case of any other pretermitted child, such child is protected only if the omission occurred either because the decedent erroneously thought the child was dead or because he was unaware of the child's birth.[106]

Special provision generally is made for inheritance rights of adopted children. Traditionally, they could inherit both from their natural parents and adoptive parents. Under many modern statutes, however, adopted children are recognized fully as part of their adoptive families and therefore can inherit only from their adoptive parents.[107] Allowance is sometimes made in two instances: (l) where the child's birth parent remarries and the stepparent adopts the child, the child may inherit from the birth parent;[108] and (2) where one of the child's birth parents dies, the surviving birth parent remarries, and the stepparent adopts the child, the child may inherit from the deceased birth parent.[109]

In some states (for example, California), an adopted child can inherit not only from the adoptive parents but in some instances from the birth parents as well,[110] although the birth parents may not always inherit from the child.[111]

share of his estate, and they cannot be excluded without just cause set forth in the will itself. La. Civ. Code Ann. arts. 1493, 1495.

[101] *See, e.g.*, Cal. Prob. Code § 6540.

[102] *Id.* § 6500. The surviving spouse and children also may be given use of any other property of the decedent that is exempt from a money judgment. *Id.* § 6510.

[103] *Id.* §§ 6520-6521.

[104] *Id.* § 21620. This provision is based on Unif. Prob. Code § 2-302(a) (1969).

[105] Thus, such a child is disinherited if (1) it appears from the will itself that the omission was intentional; (2) when the will was executed the decedent had children and left substantially all of the estate to the other parent of the omitted child; or (3) the decedent provided for the child outside the will and it appears that he intended such provision to be in lieu of a testamentary share of the estate. Cal. Prob. Code § 21621. These exceptions are taken from Unif. Prob. Code § 2-302(a) (1969).

[106] In either event the child is entitled to a share of his parent's estate equal to the share he would have received if his parent had died intestate. Cal. Prob. Code § 21622. The provision that entitles the child to a share of the estate if his parent erroneously thought he was dead is taken from Unif. Prob. Code § 2-302(b) (1969).

[107] *See, e.g.*, Alaska Stat. § 25.23.130 (unless the adoption decree expressly provides for continued inheritance rights from the natural parents); Mass. Gen. Laws Ann. ch. 210, § 7; N.Y. Dom. Rel. Law § 117; Ohio Rev. Code Ann. § 3107.15; Wis. Stat. Ann. § 854.20(1)-(2).

[108] See the Alaska, New York, Ohio, and Wisconsin statutes cited in note 107.

[109] See the Alaska, Massachusetts, Ohio, and Wisconsin statutes cited in note 107.

[110] Cal. Prob. Code § 6450. The adoptive parents can also inherit from the adopted child. *Id.*

[111] *Id.* § 6451(b).

As further protection, unless a contrary intent appears, an adopted child usually is included in any bequest or devise to a class described generally as children, issue, or heirs.[112]

STATUTES OF LIMITATION

All states impose time limitations, known as statutes of limitation, within which one having a cause of action must bring it or else be foreclosed from bringing it in the future. Different time limits apply to different causes of action. For example, California provides that the statute of limitations for any action on a written contract is four years;[113] on an oral contract the statute of limitations is two years.[114] For some actions the statute of limitations is longer; for example, for a cause of action against a developer, contractor, or architect based on a claim of faulty design, it is ten years.[115]

As another example of the law's protective attitude toward children, statutes of limitation do not run during a child's minority for any cause of action arising during minority. Thus, in California, for any of the causes of action mentioned above, the statute of limitations does not begin to run against a minor until the age of majority is reached.[116] The same is true of any other cause of action accruing during minority—that is, the statute is "tolled" during minority.[117]

If the purpose of statutes of limitation is to encourage—indeed, require—persons with knowledge of legitimate claims to seek timely relief, such purpose is thwarted under provisions tolling statutes of limitation during minority. One readily can see that from the potential defendant's perspective the possibility of legal action may be outstanding for a number of years—perhaps 20 or more—if the statute of limitations does not begin to run until a child reaches the age of majority. What social value—other than the law's patronage of children—offsets the considerable disadvantage imposed on potential defendants? The case law has been somewhat revealing as discussed below.

Some states have created exceptions to the tolling of statutes of limitation during minority, in at least two kinds of cases: (1) medical malpractice actions, and (2) paternity actions. In California, for example, the statute of limitations for medical malpractice actions generally is three years from the date of injury or one year from the date that the injured party discovers or, through reasonable diligence, should have discovered the injury, whichever occurs first.[118] For a child also the statute of limitations is three years, except that in the case of a child under the full age of six years, the action must be

[112] *Id.* § 21115(a); N.Y. Est. Powers & Trusts Law § 2-1.3; Wis. Stat. Ann. § 854.21(1).

[113] Cal. Civ. Proc. Code § 337.

[114] *Id.* § 339.

[115] *Id.* § 337.15(a).

[116] *Id.* § 352(a).

[117] *See, e.g., id.* § 328 (statute is tolled during minority for any action to recover real property); Ohio Rev. Code Ann. § 2305.16; Va. Code Ann. § 8.01-229(A).

[118] Cal. Civ. Proc. Code § 340.5.

commenced within three years or before the child's eighth birthday, whichever is the longer period.[119]

A similar statute in Texas was declared unconstitutional by the Texas Supreme Court in *Sax v. Votteler*.[120] The state has a legitimate interest, the court conceded, in increasing the availability and quality of health care in the state, which can be furthered by limiting lawsuits against providers of health-care services in order to hold malpractice insurance rates to a reasonable level and to increase availability of such insurance. The state's interest is not so great, however, as to justify foreclosure of a child's claim where the parent has failed to act in a timely fashion on the child's behalf. A child must depend on parents to bring an action on his or her behalf. If they fail to do so within the prescribed time, the child is foreclosed from bringing suit on his or her own behalf.

The Texas statute, therefore, was held to violate a provision of the state constitution guaranteeing access to courts for vindication of lawful and just claims, which the court characterized as a due process provision. The current Texas statute provides that a child under age 12 has until his 14th birthday to bring an action or to have one brought on his behalf; otherwise, the statute of limitations is two years, the same as for adults.[121] This statute, too, was held unconstitutional as applied to minors.[122]

An earlier version of an Ohio statute similar to the current Texas statute was held unconstitutional by the Ohio Supreme Court in *Schwan v. Riverside Methodist Hospital*.[123] The Ohio statute provided that a child under 10 years of age had until his or her 14th birthday to file a claim for medical malpractice, whereas the statute of limitations for a child 10 years of age or older was the same as for adults, four years.[124] Current statutory law provides that the statute of limitations for a medical malpractice claim, as with any other claim, is tolled during a child's minority.[125]

In the Ohio case, also, the court acknowledged the state's interest in ensuring continuation of health care to its citizens. The court held the statute to be a denial of equal protection of the laws, however, because it did not rationally further the state's worthy goal of ensuring quality health care for its citizens. It only created a distinction, without reasonable grounds for doing so, between medical malpractice litigants who are under age ten and those who are age 10 or older but still minors. The court added the observation that only the age of majority establishes a rational distinction.

Statutes shortening the time for bringing paternity actions have fared no better. Paternity actions typically are brought as a means of establishing an illegitimate child's right to support from his father. In *Gomez v. Perez*,[126] the United States Supreme Court

[119] *Id.* As an example of the application of the statute, see Photias v. Doerfler, 45 Cal. App. 4th 1014, 53 Cal. Rptr. 2d 202 (2d Dist. 1996).

[120] 648 S.W.2d 661 (1983).

[121] Tex. Civ. Prac. & Remedies Code, § 74.251.

[122] Adams v. Gottwald, 179 S.W.3d 101 (Tex. App. San Antonio 2005).

[123] 6 Ohio St. 3d 300, 452 N.E.2d 1337 (1983).

[124] The former statute was Ohio Rev. Code Ann. § 2305.11(B). The current statute has been renumbered and also amended. See *id.* § 2305.113. Most importantly, subsection (C) of the current statute defers to the general statute of limitations, which provides that the statute does not begin to run until the disability of minority has been removed. See *id.* § 2305.16.

[125] *Id.* § 2305.16.

[126] 409 U.S. 535 (1973).

held unconstitutional a Texas statutory scheme that allowed legitimate children a right of support from their fathers while denying any such right to illegitimate children. The Court recognized the validity of the state's desire to avoid the difficult problems of proof often associated with paternity cases but observed that such concern did not justify erection of an "impenetrable barrier" in the path of an illegitimate child's right to support.[127]

In *Mills v. Habluetzel*,[128] the Court held unconstitutional a Texas statute requiring that a paternity action be filed within one year of the child's birth.[129] Writing for the Court, Justice Rehnquist observed that "in response to the constitutional requirements of *Gomez*, Texas has created a one-year window in its previously 'impenetrable barrier' through which an illegitimate child may establish paternity and obtain parental support."[130] He further observed that "It would hardly satisfy the demands of equal protection and the holding of *Gomez* to remove an 'impenetrable barrier' to support only to replace it with an opportunity so truncated that few could utilize it effectively."[131] Thus, the one-year period was characterized as "unrealistically short."[132]

The state had argued that the shortened period was necessary because of the problems of proof in paternity actions generally, problems made worse by passage of time. A concurring opinion by Justice O'Connor noted that problems of proof are presented in other civil cases as well, yet a paternity case is one of the few causes of action singled out for special treatment.[133]

Mills v. Habluetzel could be viewed as simply condemning an "unreasonably short" one-year statute of limitations, but for the Court's subsequent decision in *Pickett v. Brown*[134] holding Tennessee's two-year statute of limitations[135] unconstitutional as well. Specifically, the Court held that the two-year period was not long enough to afford an adequate opportunity to bring a paternity suit. Even in a two-year period, the mother might not be inclined to bring such a suit because of continuing affection for the child's father, a desire to avoid disapproval of family and community, emotional strain and confusion, or other reasons.

[127] *Id.* at 538.

[128] 456 U.S. 91 (1982).

[129] In 1981 the statute was amended to allow a four-year period in which suit could be brought. In 1983 it was amended again to allow bringing of a paternity action any time prior to two years after the child reaches the age of majority. See former Tex. Fam. Code Ann. § 13.01. In 2001 § 13.01 was repealed and Texas adopted the Uniform Parentage Act, and the new statutory scheme allows an action to be commenced at any time in the case of a child with no presumed, acknowledged, or adjudicated father, Tex. Fam. Code Ann. § 160.606, but provides that in case of a child with a presumed, acknowledged, or adjudicated father, an action must be commenced with four years after the child's birth. Tex. Fam. Code Ann. §§ 160.607, 160.609.

[130] 456 U.S. at 95.

[131] *Id.* at 97.

[132] *Id.* at 101.

[133] *Id.* at 104.

[134] 462 U.S. 1 (1983).

[135] In 1984 the Tennessee statute was amended to allow a paternity action to be filed any time prior to one year after the child reaches the age of majority. See former Tenn. Code Ann. § 36-2-103(b). The current statute, *id.* § 36-2-306, provides that a paternity action may be commenced at any time prior to three years after the child reaches the age of majority.

Moreover, the statute did not bear a substantial relationship to the state's interest in avoiding problems of proof. For example, the two-year limitation was not imposed on the state's right to bring a paternity suit in a case in which the child was or was likely to become a public charge, even though evidence would be just as stale in these cases as in others. This exception belied the state's asserted interest in avoiding evidentiary difficulties. And, as in *Mills v. Habluetzel*, the fact remained that in most other civil actions, statutes of limitation were tolled during a child's minority. All of these considerations suggested illegitimate children were being discriminated against without valid purpose.[136]

In the last two Supreme Court decisions, one of the concerns expressed by the Court was that paternity actions were singled out for different treatment from most other causes of action involving children. Perhaps this concern is limited to paternity actions because of the Court's "heightened scrutiny" of any statutes that discriminate against illegitimate children.[137] Especially when taken with the actions of the Texas and Ohio courts in the medical malpractice cases, however, the Court's concern may be a signal that any statute of limitations that is shortened for children for one cause of action, to the exclusion of other causes of action, is going to be viewed with suspicion.

EMANCIPATION

The doctrine of emancipation has existed since common law times.[138] In its simplest terms, the doctrine means that a child is free from parental authority and regarded as an adult for some purposes if the child (l) is married, (2) has joined the military, (3) is living separate and apart from the parents, or (4) is otherwise economically self-supporting.[139] If a child is considered emancipated, the new status has a bearing on such matters as (1) application of intrafamily tort immunity, (2) the child's right to wages and damages, (3) the child's right to sue and be sued, (4) the child's right to parental support, (5) the child's choice of domicile, (6) the child's power to disaffirm contracts, (7) the child's ability to enlist in the military, and (8) the child's attainment of majority itself.[140]

Whether a child is deemed emancipated traditionally has been a determination made by the courts in highly particularized circumstances. For example, in *Accent*

[136] 462 U.S. at 12–16.

[137] See *id.* at 7–8.

[138] For a history of the emancipation doctrine and its variations and development at common law, see Homer Clark, The Law of Domestic Relations in the United States 240–44 (1968); Juvenile Justice Standards Relating to Rights of Minors, Standard 2.1, commentary at 21–23 (Institute of Judicial Administration/American Bar Association 1980); Francis C. Cady, *Emancipation of Minors*, 12 Conn. L. Rev. 62 (1979) [hereinafter Cady]; Sanford N. Katz, William A. Schroeder & Lawrence R. Sidman, *Emancipating Our Children—Coming of Legal Age in America*, 7 Fam. L.Q. 211 (1973) [hereinafter Katz et al.]. More recently, see Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. Mich. J.L. Reform 239 (1992).

[139] *See* Juvenile Justice Standards Relating to Rights of Minors, Standard 2.1, commentary at 27–30 (Institute of Judicial Administration/American Bar Association 1980).

[140] *See* Juvenile Justice Standards Relating to Rights of Minors, Standard 2.1, commentary at 27–30 (Institute of Judicial Administration/American Bar Association 1980).

Service Co. v. Ebsen,[141] the question before the court was whether an 18-year-old boy or his mother was liable for payment of medical care furnished to the boy by the plaintiff hospital. The court held that the evidence was sufficient to establish that the boy was emancipated at the time the medical care was furnished, by virtue of the facts that he had moved out of his mother's home and become self-supporting prior to the injury for which he was treated. Thus the boy, not the mother, was liable for payment of the hospital bill.

Of course, lowering of the age of majority from 21 to 18 years of age has diminished the overall significance of the emancipation doctrine because many of the litigated cases involved "children" in the 18-to-21 age group.[142] The common law doctrine of emancipation has been augmented by legislation allowing persons under 18 years of age to petition the courts for a declaration of emancipation. Some first-generation statutes have been around for many years but characteristically lack details and objective standards by which emancipation determinations are to be made and more often than not require the petition to be brought by someone other than the child.[143] A second generation of statutes has opted for a more comprehensive approach.[144]

California is typical of the latter group. The California Family Code allows a child age 14 or older to petition the court for emancipation on a showing that the child lives separate and apart from the parents with the parents' consent, and is self-supporting.[145] The child's parent, guardian, or custodian is entitled to notice of the hearing on the petition.[146] The petition is granted if the court finds the information contained in it to be true and that emancipation would not be adverse to the child's best interests.[147] If the petition is sustained and a declaration of emancipation issued,[148] the child thereafter is considered an adult for a number of purposes:

(a) The minor's right to support by the minor's parents.
(b) The right of the minor's parents to the minor's earnings and to control the minor.
(c) The application of [various jurisdictional provisions of the juvenile code].
(d) Ending all vicarious or imputed liability of the minor's parents or guardian for the minor's torts. . . .

[141] 209 Neb. 94, 306 N.W.2d 575 (1981).

[142] *See, e.g.*, Lev v. College of Marin, 22 Cal. App. 3d 488, 99 Cal. Rptr. 476 (1971); Vaupel v. Bellach, 261 Iowa 376, 154 N.W.2d 149 (1967); In re Fiihr, 289 Minn. 322, 184 N.W.2d 22 (1971); Accent Serv. Co. v. Ebsen, 209 Neb. 94, 306 N.W.2d 575 (1981).

[143] H. Jeffrey Gottesfeld, Comment, *The Uncertain Status of the Emancipated Minor: Why We Need a Uniform Statutory Emancipation of Minors Act (USEMA)*, 15 U.S.F. L. Rev. 473, 477–79 (1981) [hereinafter Gottesfeld].

[144] *See, e.g.*, Alaska Stat. § 09.55.590; Cal. Fam. Code §§ 7000 et seq.; Conn. Gen. Stat. Ann. §§ 46b-150 et seq.; Tex. Fam. Code Ann. §§ 31.001 et seq. Others are listed in Gottesfeld, *supra* note 143, at 479 & n.34.

[145] Cal. Fam. Code § 7120.

[146] *Id.* § 7121(a).

[147] *Id.* § 7122(a).

[148] *Id.* § 7122(b).

(e) The minor's capacity to do any of the following:
  (1) Consent to medical, dental, or psychiatric care, without parental consent, knowledge, or liability.
  (2) Enter into a binding contract.
  (3) Buy, sell, lease, encumber, exchange, or transfer an interest in real or personal property, including, but not limited to, shares of stock in a domestic or foreign corporation or a membership in a nonprofit corporation.
  (4) Sue or be sued in the minor's own name.
  (5) Compromise, settle, arbitrate, or otherwise adjust a claim, action, or proceeding by or against the minor.
  (6) Make or revoke a will.
  (7) Make a gift, outright or in trust.
  (8) Convey or release contingent or expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy, and consent to a transfer, encumbrance, or gift of marital property.
  (9) Exercise or release the minor's powers as donee of a power of appointment unless the creating instrument otherwise provides.
  (10) Create for the minor's own benefit or for the benefit of others a revocable or irrevocable trust.
  (11) Revoke a revocable trust.
  (12) Elect to take under or against a will.
  (13) Renounce or disclaim any interest acquired by testate or intestate succession or by inter vivos transfer, including exercise of the right to surrender the right to revoke a revocable trust.
  (14) Make an election referred to in Section 13502 of, or an election and agreement referred to in Section 13503 of, the Probate Code.
  (15) Establish the minor's own residence.
  (16) Apply for a work permit pursuant to Section 48110 of the Education Code without the request of the minor's parents.
  (17) Enroll in a school or college.[149]

Before amendment in 1980, a Connecticut statute allowed a minor age 16 or older to petition for emancipation on the ground, among others, "that the parent-child relationship has irretrievably broken down,"[150] raising the specter that courts would grant children something akin to a divorce from their parents on a showing of family disharmony. The statute currently provides for judicial emancipation if the child is married, on active duty in the military service, is living separately from the parents with or without their consent, and is self-supporting, or "for good cause shown, it is

[149] *Id.* § 7050. The California statutory emancipation scheme is discussed in David B. Roper, Note, *California's Emancipation of Minors Act: The Costs and Benefits of Freedom from Parental Control*, 18 Cal. W .L. Rev. 482 (1982).

[150] 1979 Conn. Acts, P.A. No. 79-397, § 3 (Reg. Sess.), amended by 1980 Conn. Acts, P.A. No. 80-283, § 1 (Reg. Sess.). Before its amendment, the Connecticut provision was discussed and criticized in Cady, *supra* note 138, at 81–85. *See also* Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. Rev. 605, 608–09.

in the best interests of either or both parties" that the court declare the child emancipated.[151] If the child is declared emancipated, the declaration is effective for purposes similar to those contained in the California statutes.[152]

Some have argued that such an approach does not go far enough, that what is needed are specific legislative provisions dealing with emancipation in each substantive area of law. Thus, the Juvenile Justice Standards recommend that the statutes dealing with contract law, the making of wills and so forth should include provisions addressing the issue of when and under what circumstances children may, for example, enter into binding contracts and make wills.[153] The Standards specifically provide that a child is entitled to his own wages and that child and parent can sue one another for tortious behavior.[154] They also contain specific provisions on child support,[155] consent for medical care,[156] youth employment,[157] and contracts.[158]

Areas of substantive law containing no provision on the effect of minority or emancipation would be governed by a general statute that treats as emancipated any child who is living separately from his parents, with or without their consent, and is self-supporting.[159] Unlike the California and Connecticut provisions mentioned above, however, the Standards would not authorize judicial decrees of emancipation because of the unresolved problems of children who might be unaware of the emancipation procedures or who, for whatever reason, have not obtained a decree of emancipation but yet might be functioning independently of parental support and control.[160]

Whether one favors the approach of the Standards or that found in the new emancipation statutes, most commentators are in agreement that reform is needed.[161] Indeed, the purpose of this chapter is to demonstrate the law's need of a consistent, coherent position regarding the circumstances under which children ought to be regarded as adults and the purposes for which they should be so regarded. Fulfilling this need does not necessarily require that for all purposes children should be regarded as adults at the same age, but it does require that such decisions in each area of private law be made in reference to and not independently of all other areas of private law, as has been the case traditionally.

Thus, the law should not take one attitude toward a child's capacity to enter into a binding contract and a different attitude toward a child's responsibility for his tortious behavior, without in either instance considering the law's attitude toward children in

[151] Conn. Gen. Stat. Ann. § 46b-150b. The petitioner must be at least 16 years of age. *Id.* § 46b-150.

[152] *Id.* § 46b-150d.

[153] Juvenile Justice Standards Relating to Rights of Minors, Standard 2.1(A) and commentary at 30–31 (Institute of Judicial Administration/American Bar Association 1980); see the earlier sections in this chapter on Contracts and Testamentary Transfer of Property.

[154] *Id.*, Standard 21(B) and commentary at 31–32.

[155] *Id.*, Standards 3.1–3.4.

[156] *Id.*, Standards 4.1–4.9.

[157] *Id.*, Standards 5.1–5.8.

[158] *Id.*, Standard 6.1.

[159] *Id.*, Standard 2.1(C) and commentary at 32–33.

[160] *Id.*, Standard 2.1(C) and commentary at 33.

[161] *Id.*, Standard 2.1, commentary at 21–24, 30–33; Gottesfeld, *supra* note 143.

other areas of private law. The law needs to develop a general view of a child's capacity to make decisions and to be responsible for his or her actions and his or her property, and if there are specific areas in which the rule should be otherwise, for example, the age at which one is able to purchase alcoholic beverages, those should be set out and rationally explained.[162]

[162] Refer generally back to the subject matter of Chapter 1 and specifically to Frank Zimring, The Changing Legal World of Adolescence 111–15 (1982).

3 "Life, Liberty and Property": The Supreme Court and Children's Rights

. . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

–Justice James C. McReynolds
Pierce v. Society of Sisters
268 U.S. 510, 535 (1925)

. . . [N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.

–Justice Wiley B. Rutledge
Prince v. Massachusetts
321 U.S. 158, 166 (1944)

INTRODUCTION

Over a period of years the United States Supreme Court has decided numerous cases touching on children's rights. In this chapter, 1923 is the beginning point when the Supreme Court decided the case of *Meyer v. Nebraska*.[1] Though the cases are not in chronological order, this legal and philosophical odyssey culminates in the Court's

[1] 262 U.S. 390 (1923).

decision in *Morse v. Frederick*[2] in 2007. The membership—and therefore the philosophy and jurisprudence—of the Court has changed considerably since 1923. Some have argued that over the years the Court has failed to develop a consistent theory of children's rights. This chapter ends with some conclusions addressing whether the Court has succeeded or failed along those lines.

The cases have been categorized into subject matter groups—for example, the education cases, the abortion cases, and so forth—rather than being presented in chronological order. The juvenile justice cases are not included here but rather are presented and discussed in a subsequent chapter[3] because those cases deal with different kinds of children's rights—namely, those analogous to rights of adult defendants in the criminal process.

What is presented in this chapter is the Supreme Court's analytical framework for deciding children's rights issues, with emphasis on the competing interests favoring, on the one hand, increased autonomy for children at an earlier age than traditionally has been the case and, on the other hand, increased parental supervision over children or increased state intervention into the lives of children to protect them from perceived harms or risks. The reader will observe, no doubt, that from one context to the next, and from one historical time period to the next, the balance between children's autonomy, parental control, and state authority ebbs and flows, which has generated some uncertainty over the Supreme Court's ability, as an institution reflecting and influencing societal values over the long term, to develop a consistent, cohesive policy toward children and their position in the law. Judge for yourself.

EDUCATIONAL AUTHORITY OF THE STATE

Meyer v. Nebraska

Meyer v. Nebraska[4] was an appeal by a Nebraska teacher from a conviction in state court for violation of a state statute that prohibited the teaching of any foreign language in public or private schools. The question presented was whether the statute unreasonably infringed on his liberty interest guaranteed under the Fourteenth Amendment's Due Process Clause, which provides that "No state . . . shall deprive any person of life, liberty, or property without due process of law."

As such, the case really was not a children's rights case at all, although the Court, perhaps inevitably, addressed the total relationship between child, parent, teacher, and state in determining whether the state had overreached its authority: "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected."[5] And elsewhere: "His [the teacher's] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment."[6]

[2] 551 U.S. 393 (2007).

[3] See Chapter 9.

[4] 262 U.S. 390 (1923).

[5] *Id.* at 401.

[6] *Id.* at 400.

What was the "liberty" guaranteed under the Fourteenth Amendment? What must be remembered about this case is that until the Supreme Court's decisions in the 1960s in *Griswold v. Connecticut*[7] and *Loving v. Virginia*,[8] the Court's decision in *Meyer v. Nebraska* was the only pronouncement on the meaning of due process of law in the family context. The Court went through a litany of due process rights, some of which touched on the family:

> [I]t [due process] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[9]

Having found that the teacher's right to teach foreign language was within the liberty so described, the Court further judged that the state's ban on teaching of foreign languages unduly "interfere[d] with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."[10] The Court thus came down squarely in favor of parents and the family against what it perceived as unreasonable and unwarranted interference and stifling regulation by the state.

Pierce v. Society of Sisters

In *Meyer v. Nebraska,* the Court said that "The power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned."[11] School attendance, of course, was not at issue in *Meyer v. Nebraska.*

[7] 381 U.S. 479 (1965). In *Griswold* the Court held a statute prohibiting the use of contraceptives unconstitutional as an undue infringement of the right to privacy.

[8] 388 U.S. 1 (1967). In *Loving* the Court held a statute banning interracial marriage unconstitutional on equal protection and due process grounds as an infringement on the right to marry.

[9] 262 U.S. at 399.

[10] *Id.* at 401. More recent cases addressing due process of law in the family context include Lawrence v. Texas, 539 U.S. 558 (2003) (statute making it a crime for people of the opposite sex to engage in intimate sexual conduct unconstitutional as applied to consensual conduct in privacy of home); Washington v. Glucksberg, 521 U.S. 702 (1997) (asserted right to assistance in committing suicide was not fundamental liberty interest protected by due process of law; statute banning assisted suicide was rationally related to state's legitimate interests in preserving life, preventing suicide, maintaining ethics and integrity of medical profession, protecting vulnerable persons who might be pressured into committing suicide, and protecting disabled and terminally ill persons from prejudice, negative and inaccurate stereotypes, and societal indifference); and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (informed consent requirements, 24-hour waiting period, parental consent requirement, and reporting and record-keeping provisions of abortion statute did not impose undue burden on woman's right to choose and, therefore, did not violate due process; however, spousal notification requirement did impose undue burden and thus violated due process).

[11] 262 U.S. at 402.

It was the issue in *Pierce v. Society of Sisters*.[12] The Oregon statute in question required every school-age child, with certain exemptions, to attend public school. The Court reiterated its view taken in *Meyer v. Nebraska*: "No question is raised concerning the power of the state . . . to require that all children of proper age attend some school."[13]

The appellees, both private schools, objected that the statute interfered with "the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, [and] the right of schools and teachers therein to engage in a useful business or profession."[14] As in *Meyer v. Nebraska*, the Court viewed this as more of a parents' rights case and, relying on *Meyer*, was of the opinion that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[15]

Once again the Court came down strongly on the side of parents in a conflict between parental authority and state authority in educational matters. Moreover, the Court implied that parental authority extended to "upbringing" as well as to educational matters. A policy favoring parental control over state interference in family matters seemed to be emerging, underscored by the poignant statement quoted at the beginning of this chapter.[16]

Wisconsin v. Yoder

All states and the District of Columbia have compulsory school attendance laws—laws that require parents to send their children to school until a certain age, typically 16.[17] Wisconsin's law became the focus of attention in 1972 in the case of *Wisconsin v. Yoder*,[18] in which the Supreme Court was confronted with the issue of whether Amish parents could refuse to send their children to school beyond the eighth grade (when they were age 14 or 15) based on their claim of free exercise of religion under the First Amendment.

The Amish parents were convicted in criminal court for failure to send their children to school in accordance with state law. The Wisconsin Supreme Court reversed their convictions on the ground that their First Amendment right to free exercise

[12] 268 U.S. 510 (1925).

[13] *Id.* at 534.

[14] *Id.* at 532.

[15] *Id.* at 534–35.

[16] See the statement by Justice McReynolds in Pierce v. Society of Sisters, quoted at the beginning of this chapter.

[17] Mississippi repealed its compulsory attendance law in 1956 but enacted a new law in 1977, thus making the requirement universal in the United States. For general works on the history of education in America and on the development of compulsory attendance laws in particular, *see* R. Freeman Butts & Lawrence A. Cremin, A History of Education in American Culture (1953), and Newton Edwards & Herman G. Richey, The School in the American Social Order (2d ed. 1963). A current summary of case law, particularly with respect to exemptions from compulsory school attendance laws, is found in Samuel M. Davis, Walter Wadlington, Charles H. Whitebread & Elizabeth Scott, Children in the Legal System 32–39 (4th ed. 2009).

[18] 406 U.S. 205 (1972).