

2013

Misplaced Misrepresentations: Why Misrepresentation-of-Age Statutes Must Be Reinterpreted as They Apply to Children's Online Contracts

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Michelle A. Sargent, *Misplaced Misrepresentations: Why Misrepresentation-of-Age Statutes Must Be Reinterpreted as They Apply to Children's Online Contracts*, 112 MICH. L. REV. 301 (2013).

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NOTE

MISPLACED MISREPRESENTATIONS: WHY MISREPRESENTATION-OF-AGE STATUTES MUST BE REINTERPRETED AS THEY APPLY TO CHILDREN'S ONLINE CONTRACTS

*Michelle A. Sargent**

The information age revolutionized the relationship between individuals and the internet. Today, children are the targets of online advertisements that lure them into accepting terms of service, thus entering into online agreements. While children may feel comfortable navigating websites, they are psychologically predisposed to be unsophisticated and impulsive actors online. Children lack the digital literacy to understand the implications of accepting website terms of service.

Meanwhile, several states have misrepresentation-of-age statutes that prevent children from using the infancy doctrine to disaffirm online contracts because, in accepting the terms of service, children often represent that they are old enough to enter into the agreement. This Note argues that the heightened vulnerability of children online requires a reconsideration of the application of misrepresentation-of-age statutes to children's online contracts. To adequately balance the policy interests in protecting children against misrepresentation statutes' goal of preventing unknowing adults from being taken advantage of in the marketplace, this Note recommends that judges undertake a fact-specific, contextual inquiry of the online contract formation process.

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* J.D. Candidate, May 2014, University of Michigan Law School. I would like to thank my Notes Editors as well as the Volume 112 Notes Office for their invaluable comments. My everlasting gratitude goes to my parents, Stephanie Goldfarb, and Kwame Gyimah for their unwavering support and motivation, and to Carly Burdick, whose guidance on child-psychology research and reassurances made this topic possible.

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INTRODUCTION

“That’s the duty of the old . . . to be anxious on behalf of the young. And the duty of the young is to scorn the anxiety of the old.”¹

This maxim could reflect the relationship between adults and children at any time throughout our history. Yet, in the modern digital era, some argue that children are technologically savvy, sophisticated consumers whose “no-accountability shield . . . allow[s] them to wreak havoc on the electronic commerce system with little or no legal consequences.”²

“No-accountability shield” refers to the infancy doctrine. Under the infancy doctrine, a child’s contract is voidable,³ meaning that the transaction is per se valid, but a child can disaffirm the contract and avoid its legal obligations.⁴ Children⁵ lack the capacity to contract⁶ because they lack the ability to manifest the assent to a bargain required to incur contractual liability.⁷ The long-accepted rationale behind the doctrine reflects society’s general interest in protecting children: “It was thought that the minor was immature in both mind and experience; therefore, he should be protected

1. PHILIP PULLMAN, *THE GOLDEN COMPASS* 32 (deluxe 10th anniversary ed. 2005).

2. Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors’ Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 241 (2007–2008); see also Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL’Y 275, 366 (2006) (“[C]hildren’s incapacity to contract . . . conflicts with society’s current understanding of children’s role in the marketplace.”).

3. 5 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 9:5 (4th ed. 2009).

4. RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981). A child does not have to manifest his intention to disaffirm the contract until an action is brought against him to enforce the contract. See *id.* § 7 cmt. d. Moreover, a child cannot ratify the contract and make it enforceable against him until he reaches majority. See *id.* § 7 cmt. d., illus. 3.

5. For the purposes of the infancy doctrine, a child is anyone who has not yet reached the age of majority, which in most American jurisdictions is eighteen. See 5 WILLISTON & LORD, *supra* note 3, § 9:3. The doctrine applies indiscriminately; it draws no distinction between young children and adolescents a day away from reaching majority. *Id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 14 (“[A] natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday.”).

6. RESTATEMENT (SECOND) OF CONTRACTS § 12(2)(b).

7. See *id.* § 12 cmt. c.

from his own bad judgment as well as from adults who would take advantage of him.”⁸ In essence, children cannot properly evaluate the benefits and risks of a contract and so are vulnerable to adults with more knowledge and bargaining power taking advantage of them in the marketplace.⁹ This notion that children are not fully capable of understanding the legal significance of their actions, and therefore should not be held responsible according to the same standards as adults, is mirrored elsewhere in the law.¹⁰

Judicial and legislative exceptions and defenses have gradually qualified the infancy doctrine.¹¹ Some of these exceptions, such as contracts for necessities, contracts entered into by emancipated minors, and contracts for employment, reflect the reality that, in certain instances, children may actually need to enter into binding contracts.¹² Others, most notably the misrepresentation-of-age¹³ and retained-benefit defenses,¹⁴ seek to provide adults

8. James L. Sivils, Jr., Comment, *Contracts—Capacity of the Older Minor*, 30 U. KAN. CITY L. REV. 230, 230 (1962).

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

10. In tort law, children are generally held accountable for their torts. This potential for liability has created some confusion among courts as to whether a minor who can disaffirm a contract where he has misrepresented his age may nevertheless be held liable in tort for deceit. An analysis of this uncertainty is beyond the scope of this Note, but see 5 WILLISTON & LORD, *supra* note 3, § 9:22, for a discussion and related sources. Additionally, children may not be found liable for intentional torts such as battery, slander, or trespass if a court finds them too young to have formed the requisite intent. 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 9:1 (rev. 2d ed. 2005). And under the tender years doctrine, courts judge children’s negligent acts by a subjective standard—“that of a child of like age, intelligence, and experience”—rather than the objective reasonable person standard applied to adults. *Id.* § 9:2. Similarly, in criminal law, the juvenile justice system typically handles children, reflecting society’s view that children “have diminished responsibility due to their age.” Cunningham, *supra* note 2, at 279. Cunningham examines the common law policy of applying a rebuttable presumption of incapacity to children between seven and fourteen years old as well as the tension between the “Child Savers Movement,” which viewed juvenile criminals as “psychologically troubled, malleable victims,” and “law-and-order” proponents who view child-offenders as “willful, malicious, and adult-like” and so deserving of adult accountability. *Id.* at 311–15.

11. See Slade, *supra* note 9, at 617–19.

12. For an analysis of these exceptions and the policies behind them, see Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 51–59 (2012).

13. A child who misrepresents that he is of the age of majority may not be allowed to disaffirm a contract if an adult was reasonable in relying on the child’s misrepresentation. For a discussion of this defense’s evolution, see Larry A. DiMatteo, *Deconstructing the Myth of the “Infancy Law Doctrine”: From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 496–97 (1994).

14. Under the retained-benefit exception, a child can only disaffirm a contract if he makes restitution of the benefits received therefrom. See 5 WILLISTON & LORD, *supra* note 3, § 9:14 (“[A] minor cannot take the benefit of the contract without the burden of the conditions or stipulations.”). For example, if a child purchases a car and damages it in an accident, the minor can only disaffirm the contract if he returns the damaged car or its equivalent value to the seller. Preston & Crowther, *supra* note 12, at 63.

who contract with children some protection when children try to disaffirm their contracts.¹⁵

The myriad of exceptions and the uncertainty of their application in the modern contract era have left the infancy doctrine on ambiguous ground, especially with regard to the internet.¹⁶ The result has been a resurgence of legal scholarship analyzing the doctrine's relevance. One side argues that the sophisticated nature of commercial transactions, the commercial value and proportion of children who are online consumers, and the technological competence of children warrants abandoning the infancy doctrine.¹⁷ The other side contends that in an online environment, where the "processes of online contracting" rely on boilerplate terms of service and where the willingness of online service providers ("OSPs") to advertise to and contract with children "encourage[s] thoughtless and impulsive behavior," the infancy doctrine is more relevant than ever.¹⁸

In spite of this resurgence in scholarship, there has only been cursory analysis of how online contracting affects the misrepresentation-of-age defense.¹⁹ At common law, if an adult contracted with a child believing the child to be of age—either because the child was engaged in business, misrepresented his age, or appeared to be of age—the child still retained the ability to disaffirm the contract.²⁰ Five states, however, have promulgated misrepresentation-of-age statutes that move in the opposite direction.²¹ These statutes prevent a child from disaffirming a contract if the contracting adult had

15. See Preston & Crowther, *supra* note 12, at 59–63.

16. See *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473, 481 (E.D. Va. 2008) (extending the retained-benefit defense to prevent high school students, who were required to submit their papers through a website that checked submissions for plagiarism, from disaffirming an online contract that allowed the website to archive their original works because they had retained the benefit of a grade from their teacher), *rev'd in part on other grounds*, 562 F.3d 630 (4th Cir. 2009).

17. See Daniel, *supra* note 2. Daniel relies on social science studies from the 1970s in reasoning that "adolescents possess decision-making maturity on par with adults," *id.* at 253, and he reaches the dramatic conclusion that, in protecting these adolescents from their online contracts, society "bear[s] the burdens of being denied access to an expanding world of e-commerce," *id.* at 258.

18. Cheryl B. Preston, *CyberInfants*, 39 PEPP. L. REV. 225, 276–77 (2012); accord Slade, *supra* note 9, at 614–16. In the context of this Note, OSPs include companies, organizations, groups, and individuals that provide online services, including, but not limited to, e-commerce, e-banking, social media, news, entertainment websites, discussion forums, and webmail.

19. See Daniel, *supra* note 2, at 248 (observing disagreement among states regarding whether a minor can disaffirm a contract he induced by misrepresenting his age "irrespective of how the misrepresentation was made"); Preston, *supra* note 18, at 248–52 (arguing that OSPs fail to make reasonable efforts to ascertain the age of website users and so, applying common law estoppel principles, they cannot use intentional misrepresentation of age as a defense).

20. 5 WILLISTON & LORD, *supra* note 3, § 9:22.

21. IOWA CODE § 599.3 (2011); KAN. STAT. ANN. § 38-103 (2000); MICH. COMP. LAWS § 600.1403 (1979); UTAH CODE ANN. § 15-2-3 (LexisNexis 2009); WASH. REV. CODE § 26.28.040 (2012).

reason to believe that the contracting child had the capacity to contract because the child misrepresented his age.²² Commentators have generally seen the policy underlying these statutes as protecting innocent adults who children deceive into believing that they are contracting with other adults.²³

Nevertheless, online agreements frequently contain hidden language by which the accepting party represents that he has the capacity to contract. As a result, children seamlessly enter into contracts in which they implicitly misrepresent their age and thus lose the ability to void the contracts. In doing so, children risk binding themselves to oppressive terms in the form of forum selection clauses, warranty waivers, and dispute resolution procedures; they may also inadvertently grant licenses to their intellectual property, as well as authorize websites to track their usage and preferences so that the websites can display targeted content. This is in addition to the obvious potential for children to spend money and incur debts that may fall on unsuspecting parents or damage their credit.²⁴

This Note argues that state statutes preventing children from disaffirming contracts when they misrepresent their age should be reinterpreted with respect to children's online contracts. These statutes universally preceded the advent of online transactions and therefore fail to account for the increased vulnerability of children online. In particular, these statutes do not deal with the problem of inadvertent misrepresentations in online contracts, and they were promulgated without the benefits of recent studies about the effects of online advertising and digital media on children.

Part I examines modern trends in doctrinal contract law, emphasizing the proliferation of nonnegotiable boilerplate, the lessening of requirements for assent, and the broadening of judicial tolerance of oppressive contract terms. This Part argues that the world of clickwrap,²⁵ browsewrap,²⁶ and e-

22. See IOWA CODE § 599.3 (preventing a minor from disaffirming a contract if the minor misrepresented his majority); KAN. STAT. ANN. § 38-103 (same); UTAH CODE ANN. § 15-2-3 (same); WASH. REV. CODE § 26.28.040 (same); cf. MICH. COMP. LAWS ANN. § 600.1403 (preventing a minor from disaffirming a contract for goods, merchandise, chattels, or loans of money if the minor willfully represented himself as over eighteen years old when making the agreement).

23. Preston & Crowther, *supra* note 12, at 62.

24. One of the paramount concerns about children's online activity is the issue of privacy online. An expansive analysis of privacy issues is beyond the scope of this Note, but see *infra* notes 158–159 for relevant sources that may provide a gateway into the issue.

25. A clickwrap agreement is created when, in order to use a website, set up an account, or place an order, a user browsing a website clicks on an electronic button or pop-up screen on the website that states something such as “Yes” or “I accept,” accepting the website's terms of service. Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. PUB. L. 1, 17–18 (2011). Such actions are sufficient to manifest assent that the user has read, understood, and agreed to the website terms. The terms of service themselves are often hidden beneath another layer of the website, requiring the user to click on a secondary link to actually read the terms of service.

26. A browsewrap agreement is created merely by a user accessing (“browsing”) a website. The website's terms of service “purport, by their own terms, to become binding against anyone using the site.” *Id.* at 18. The terms of service will normally mention that “using the

commerce²⁷ agreements increases children's vulnerability in contracting, and so the infancy doctrine remains an important tool to protect them. Part II contends that children's impaired digital literacy, especially impediments to their online decisionmaking and text-comprehension, as well as their susceptibility to online advertisements and marketing, make children especially vulnerable to unwittingly entering into contracts online. Part III argues that misrepresentation-of-age statutes are, therefore, incongruent with children's online contracts because (1) online advertisements and hidden representations add weight to the infancy doctrine's policy interests in protecting children, (2) there are strong commercial incentives for websites to enter into contracts with children, and (3) children should not be held responsible for irrational online decisions just because adults are held accountable. Finally, Part IV discusses the potential for legislative solutions that adapt misrepresentation-of-age statutes to reflect the modern online world and asserts that, in the short term, judicial reinterpretation of the language of misrepresentation-of-age statutes may be more effective.

I. THE INFANCY DOCTRINE IN THE MODERN CONTRACT ERA

For the last two decades, there has been an explosion of literature discussing the modern contract era, its weakening requirements for assent, and its tolerance for increasingly oppressive terms, as well as the legal, sociological, and economic justifications for and criticisms of this transformation.²⁸ Traditionally, contract formation was seen as a "meeting of the minds"—two individuals voluntarily entering into an agreement with full knowledge of the terms.²⁹ In the modern era, this concept is mostly a fiction. On the internet in particular, users frequently enter into clickwrap and browsewrap agreements without understanding or appreciating their legal significance.

The purpose of this Part is not to critique all arguments about modern contract theory or their application to online contracts but rather to provide sufficient background to contextualize the vulnerability of children in this new era. Section I.A examines the nonnegotiable nature of contracts and the proliferation of oppressive terms as well as courts' reinforcement of these

services indicates acceptance of all of the terms in that [terms of service]." *Id.* Users, therefore, may enter into binding contracts without knowing of the agreements' existence or their legal consequences.

27. E-commerce agreements are contracts that are created for the purchase or sale of goods and services on the internet. See *E-commerce*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/e-commerce> (last visited Apr. 5, 2013). In the context used here, these agreements are created when a user accepts or agrees to complete a transaction online; the agreement will often incorporate by reference the website's terms of use and privacy policy and will bind the user to the website's payment terms and schedule. Similar to those of a clickwrap agreement, the terms of an e-commerce agreement are often not presented to the website user; the user must actively follow a link to read the agreement.

28. See generally "Boilerplate": *Foundations of Market Contracts Symposium*, 104 MICH. L. REV. 821 (2006).

29. Margaret Jane Radin, Commentary, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231 (2006).

developments. Section I.B then demonstrates how this trend has heightened children's vulnerability, especially when entering into agreements online, and justifies the resurgence of the infancy doctrine to protect them.

A. *Nonnegotiable Contracts and Oppressive Terms*

Classical contract theory recognized that, in a free-will system, it was necessary to invalidate agreements that demonstrated a lack of free will in the assent.³⁰ This recognition formed the basis for the doctrines of unconscionability,³¹ fraud and misrepresentation,³² and duress.³³ Recent jurisprudence, however, reveals courts' increasing willingness to uphold clauses that would not have met traditional contract formation requirements³⁴ and that courts would traditionally have invalidated based on these doctrines.³⁵ For example, courts have reinforced the modern reality that consumer contracts for the sale of goods or services are frequently not freely negotiated by enforcing boilerplate adherence contracts where one contracting party did not even see the contract's terms until after the contract was formed.³⁶ In doing so, courts' opinions have emphasized the economic benefits of form contracts and boilerplate language,³⁷ benefits which are magnified in the digital marketplace. In the online arena, courts have also shown substantial deference to the "importance of supporting an emerging technology/digital market, rather than pressuring businesses to draft non-negotiable contracts that reflect reasonable and fair terms."³⁸

30. See *id.* at 72.

31. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (refusing to recognize contracts where the resulting agreement was so bad that there must have been bad bargaining in its creation).

32. See *id.* §§ 159–61, 163–64, 166 (invalidating an agreement where there is no real consent because one party concealed or misrepresented facts to induce the formation of the contract).

33. *Id.* § 175.

34. Preston & Crowther, *supra* note 12, at 73–74.

35. See, e.g., AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746–53 (2011) (refusing to find mandatory arbitration provisions in cell phone contracts unconscionable).

36. E.g., Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593–97 (1991) (upholding a forum selection clause on a cruise ticket that the passenger had already purchased before being presented with the terms on the grounds that enforcing the provision would not be fundamentally unfair because the passenger was unlikely to negotiate the terms anyway and benefited from lower ticket prices due to the corporation's ability to self-insure against litigation); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1453–55 (7th Cir. 1996) (validating clickwrap licensing by finding that a valid contract was formed when the defendant clicked "accept" to licensing terms).

37. E.g., *Carnival Cruise Lines*, 499 U.S. at 594. For further discussion of the economics of standard form contracts, see Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983 (2006); and Radin, *supra* note 29.

38. Preston & McCann, *supra* note 25, at 12–13.

Many modern contracts are not simply nonnegotiable; they are unmodifiable. Consumers do not have the opportunity to counteroffer or negotiate the terms of use.³⁹ Courts have reinforced this all-or-nothing, take-it-or-leave-it approach by refusing to validate consumers' attempts to alter websites' terms of use.⁴⁰

Form contracts have also become replete with arduous terms that the ordinary consumer would be hard-pressed to understand. While we may expect adult consumers to have some facility with clauses pertaining to arbitration requirements, warranty waivers, and forum selection clauses, it is unlikely that they understand the full extent of these agreements.⁴¹ Moreover, in the event that consumers do try to read agreements, the terms often contain arcane legalese.⁴² When form contracts are transposed into the digital world, a standard online agreement may give an OSP the unilateral right to modify the contract, prohibit the contract's transfer, grant the OSP the power to terminate services, deny rights of survivorship (effectively deleting the consumer's online data and content in the event of death or deactivation), and afford the OSP the right to any and all creative content posted on a website.⁴³

Courts have increasingly upheld these terms.⁴⁴ In so doing, they have promoted the commercial efficiency of boilerplate agreements over the imposition of nonnegotiable terms and expensive litigation on individuals. Terms that were once seen as a means of "unfairly strip[ping] underdog consumers of judicial rights" are now "prima facie valid."⁴⁵

B. *The Effects of Nonnegotiable and Oppressive Terms on Children*

In a world where contracts are formed effortlessly and where there is essentially no opportunity to bargain or negotiate, children making agreements online are more vulnerable than ever and require the protection of the infancy doctrine.

39. Preston, *supra* note 18, at 267; *see also* Slade, *supra* note 9, at 630 (discussing the transformation of contract formation from offer, acceptance, and negotiation to nonnegotiable, take-it-or-leave-it transactions).

40. *See, e.g.*, A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473, 480 (E.D. Va. 2008) (upholding the clickwrap agreement of Turnitin.com and emphasizing that the inclusion of disclaimers by high school students that they "did not consent to the archiving of their works [did] not modify the Agreement or render it unenforceable"), *rev'd in part on other grounds*, 562 F.3d 630 (4th Cir. 2009).

41. That is, if they even read the agreement or try to locate its terms. *See, e.g.*, Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 840–41 (2006) (discussing reasons why consumers do not read online contracts, including the "boilerplate's lack of lucidity," consumers' lack of bargaining power, and their difficulty in locating the online terms).

42. *See* Preston & McCann, *supra* note 25, at 22–23.

43. *Id.* at 23–27.

44. Preston & Crowther, *supra* note 12, at 75–76.

45. *Id.* at 74–77 (quoting *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991)) (internal quotation marks omitted).

Children predominantly enter into terms of service and agreements on social networking, gaming, and e-commerce websites.⁴⁶ In so doing, children accept boilerplate terms, such as exclusive, nonappealable arbitration provisions, venue and choice-of-law mandates, and dispute resolution requirements,⁴⁷ without realizing the potential burdens and restrictions on remedies that these terms entail. They may also grant OSPs “non-exclusive, transferable, sub-licensable, royalty-free, worldwide license[s]” to any intellectual property shared with the websites, such as uploaded photographs and videos.⁴⁸ As a result, if a parent were concerned about his child having uploaded a picture to Facebook, the parent would need to bring suit in Santa Clara County, California regardless of the cost or burden of the location. And Facebook would be able to assert that it had a license to use the image regardless of whether the child even realized that there were terms of service.⁴⁹

The ease of e-commerce agreements raises separate concerns that children will incur costs that their parents will have to pay, take on debt without knowing anything about credit, and become engaged in “earn-and-spend” lifestyles at young ages.⁵⁰ For example, in making payments on Facebook, children under the age of eighteen acknowledge that their parent or guardian is involved in the transaction, that there may be additional terms and fees at checkout (such as taxes, shipping costs, and courier terms), that Facebook disclaims any and all warranties with respect to the transaction, and that Facebook has no liability for any goods or services that are purchased.⁵¹ A child’s parents may thus be held liable for nonpayment and may be bound not only by Facebook’s terms but also by those of any third-party providers whose applications and products are accessible through Facebook.

Finally, in accepting terms of service, children consent to websites’ use of cookies and data-mining techniques that track their internet presence and preferences. This consent allows websites to target advertisements to children’s browsing habits, perpetuating the cycle of children entering into enforceable yet adhesive contracts.

Unfortunately, courts have so far been reticent to leverage the infancy doctrine in these scenarios,⁵² mirroring the general trend toward upholding form agreements. The few recent cases applying the infancy doctrine reveal both courts’ confusion about the infancy doctrine’s contours in the online

46. See *infra* text accompanying note 92.

47. See Preston, *supra* note 18, at 263–65.

48. E.g., *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/legal/terms> (last updated Dec. 11, 2012).

49. *Id.*

50. Slade, *supra* note 9, at 634–36.

51. *User Payments Terms*, FACEBOOK, http://www.facebook.com/payments_terms (last updated Feb. 4, 2013).

52. See Preston & Crowther, *supra* note 12, at 66–71 (discussing possible reasons for the paucity of recent cases applying the infancy doctrine: lack of awareness about the doctrine, confusion about its contours, and the ability of OSPs to settle or threaten to terminate the use of services).

world and courts' tendency to enforce nonnegotiable, oppressive boilerplate. In *E.K.D. ex rel. Dawes v. Facebook, Inc.*, the minor plaintiffs alleged that Facebook had violated their privacy by using their names and likenesses in commercial endorsements.⁵³ First, the court refused to apply the infancy doctrine to bar Facebook from enforcing the forum selection clause in its terms of service.⁵⁴ In refusing to allow the plaintiffs the protection of the infancy doctrine, the court conducted a cursory and errant application of the retained-benefits defense that was overbroad and, if adopted widely, would risk making all children's online contracts enforceable.⁵⁵ More importantly for this Note, the court concluded that the forum selection clause was reasonable.⁵⁶ The court found that the appearance of hyperlinks on every page of the website was sufficient for the children to have constructive knowledge of the actual terms in the terms of service; it then emphasized that the children residing in Illinois should have considered any potential inconvenience of needing to litigate in California before accepting the terms of service.⁵⁷ The court's analysis and conclusion in *E.K.D.* reveals the vulnerability of children to boilerplate online terms when children are not protected by the infancy doctrine.

Similarly, in *A.V. v. iParadigms, LLC*,⁵⁸ the court relied on a distorted application of the retained-benefits exception to prevent the child-plaintiffs from benefitting from the infancy doctrine. As a result, even though students who were required to use the plagiarism website Turnitin.com to submit their schoolwork had written disclaimers on their papers withholding permission from the website to archive their work, the students were prohibited from disaffirming the website's terms of use that allowed for archiving.⁵⁹ Through a paradigmatic adhesion contract, the children were forced to jeopardize their intellectual property without the ability to negotiate the terms of its use.

Although an examination of the retained-benefits exception to the infancy doctrine is beyond the scope of this Note, these cases highlight how a legal environment that precludes the application of the infancy doctrine affects children's online contracts. The result of such a legal landscape effectively ignores the policy rationale for protecting children in favor of the competing policy of encouraging online efficiency. Ultimately, the doctrinal evolution of contract law and the prevalence of boilerplate in online terms

53. 885 F. Supp. 2d 894, 897 (S.D. Ill. 2012).

54. *E.K.D.*, 885 F. Supp. 2d at 900.

55. *See id.* at 899–900.

56. *Id.* at 900–03.

57. *Id.* at 901–02.

58. 544 F. Supp. 2d 473 (E.D. Va. 2008), *rev'd in part on other grounds*, 562 F.3d 630 (4th Cir. 2009).

59. *iParadigms*, 544 F. Supp. 2d at 481. *But cf.* *Deck v. Spartz, Inc.*, No. 2:11-CV-01123, 2011 WL 7775067, at *6–7 (E.D. Cal. Sept. 27, 2011) (finding a forum selection clause unenforceable because a child who had entered into a joint venture to expand his Twitter feed into a suite of internet products sought to disaffirm).

of service have increased the vulnerability of children online and magnified the need to protect them through the infancy doctrine.

II. THE INTERACTION OF CHILDREN AND ONLINE CONTENT

The manner in which children navigate and make decisions online reinforces the need for the infancy doctrine, which includes limiting the use of misrepresentation-of-age statutes as a means of preventing children from disaffirming their online agreements. Section II.A analyzes children's digital literacy as an impediment to children's assent to online agreements, with an emphasis on the deficiencies in children's online, as opposed to print-text, cognitive capacities. Section II.B examines the impact of online advertising on children's browsing habits and argues that children's unique susceptibility to online advertisements creates a cycle whereby children are induced into passively accepting terms of service without recognizing the legal consequences.

A. Children's Digital Literacy

The infancy doctrine emerged due to the belief that children lack the cognitive capacity to assent to agreements.⁶⁰ Although courts have since relaxed the requirements for assent, an examination of the ability of children to assent—to agree after “thoughtful consideration”⁶¹—to contract terms online is necessary to understand the infancy doctrine's relation to the online forum. Children's ability to agree is intimately tied to their ability to read, comprehend, and integrate online content with their knowledge of the world.⁶² But the internet is an unbounded world.⁶³ And concern about the effect on young people of “unguided, uncritical access to information” is almost as old as the written word itself.⁶⁴

Traditionally, people have conceived of literacy as an individual's ability to decode print-based texts.⁶⁵ Achieving literacy fluency involves a progression from recognizing and translating the features of words (their alphabet,

60. See discussion *supra* Introduction.

61. *Assent*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/assent> (last visited Apr. 5, 2013).

62. See MARYANNE WOLF, *PROUST AND THE SQUID: THE STORY AND SCIENCE OF THE READING BRAIN* 218 (2007).

63. In April 2013 there were more than 144 million top-level domains on the web. *Domain Counts & Internet Statistics*, WHOIS SOURCE, <http://www.whois.sc/internet-statistics/> (last visited Apr. 5, 2013).

64. See WOLF, *supra* note 62, at 220 (examining the development of literacy and comparing the modern world of hypertext and online searches with Socrates's concern that young people would be unable to perform critical and analytical thinking if they had unimpaired access to information).

65. See Mark Warschauer & Paige Ware, *Learning, Change, and Power: Competing Frames of Technology*, in *HANDBOOK OF RESEARCH ON NEW LITERACIES* 215 (Julie Coiro et al. eds., 2008). Text-based comprehension can be divided into four categories: code breaking, meaning making (semantic competence), functional text usage (pragmatic competence), and

phonology, spelling, and structure) to incorporating cultural knowledge about words' meanings and recognizing that the structure, tone, formality, and ideology of the text may affect these meanings.⁶⁶ Understandably, a child's brain must undergo significant reading development to achieve literacy fluency.⁶⁷

Children develop at different rates, so researchers are reluctant to state at what age a child should attain each level of reading fluency.⁶⁸ Regardless, the literature on children's emerging literacy emphasizes the extent to which children's apparent ability to read text may not reflect their "understanding" of it. An ongoing concern throughout children's reading development is their ability to differentiate between simply reading—translating the words on the page as quickly as possible—and true fluency—thinking, comprehending, and understanding the text.⁶⁹ Therefore, if we require a contracting party to have even a basic understanding before we enforce contractual liability, it is highly questionable that we could ever ascribe such an understanding to children's reading of fine-print terms of service or boilerplate.

And children's literacy online may be even more limited than the print-based developments just described. The basic ability to decode and understand online information has been termed "digital literacy."⁷⁰ Digital literacy expands the foundational skills of print-based literacy because it requires

text criticism (critical analysis). Allan Luke & Peter Freebody, *Further Notes on the Four Resources Model*, *READING ONLINE* (Aug. 1999), <http://www.readingonline.org/research/lukefreebody.html>.

66. Luke & Freebody, *supra* note 65; *see also* WOLF, *supra* note 62, at 84–85 (explaining that children's reading development can be divided into four categories: phonological development—a child's ability to hear, discriminate, and manipulate the sounds within words; semantic development—the growth in vocabulary that allows for an increased understanding of words' meanings; syntactic development—the ability to use grammatical relationships to understand complex sentences; and pragmatic development—the ability to use "socio-cultural 'rules' of language").

67. Children's developing literacy can be divided into various stages: the emerging pre-reader, novice readers, decoding readers, fluent comprehending readers, and expert readers. WOLF, *supra* note 62, at 114–15; *see also* JEANNE S. CHALL, *STAGES OF READING DEVELOPMENT* (Harcourt Brace Coll. Publishers 2d ed. 1996) (1983) (describing five stages of reading: initial reading or decoding (pre-elementary school), confirmation and fluency (ages seven to eight), reading for learning the new (elementary and middle school), multiple viewpoints (high school students ages fourteen to eighteen), and construction and reconstruction (college)). This development is marked by a transformation in the reading child's brain as the child learns to automate the visual reading process and focus on the more cognitively complex aspects of reading. WOLF, *supra* note 62, at 143.

68. *See* CHALL, *supra* note 67, at 11–12, 25–26 (emphasizing that the stages are overlapping and do not form discrete milestones; development at each stage is axiomatically dependent on the achievement in the prior stage and is affected by external factors such as home environment).

69. WOLF, *supra* note 62, at 130–32.

70. *See* Warschauer & Ware, *supra* note 65, at 215; *see also* WOLF, *supra* note 62, at 156 (mentioning that adults read more discriminatingly, sensitively, and associatively than children because of their cognitive expertise and life experience).

children to make meaning from multitextual, visual, and symbolic sources.⁷¹ When children are online, they are not merely reading the words on the screen; they are simultaneously bombarded by moving advertisement banners, distracting hyperlinks, variously colored and sized fonts, and pop-up screens promising gifts and prizes. In such an environment, a child's comprehension is inherently bounded by "time and cognitive and physical constraints."⁷² These limitations on digital comprehension impact not just a child's understanding, or "reading," of online text but also his understanding of the contract formation process itself.

Insofar as digital literacy requires children to account for all of these distractions while decoding the text on the screen, there is the obvious potential for substantial limitations on a child's online comprehension. There is a stark contrast between a child sitting at a desk with a paper contract in front of him and a child sitting behind a computer screen being asked if "yes," he would like to access a website. In the first situation, the child has a simple yes-or-no decision, and the terms of the agreement, if the child wants to read or question them, are right in front of him. In the online example, the child must first tune out the website's audiovisual features (which were created to induce potential users to want to use the website), then recognize that in accessing the website there are attendant terms of use, and finally click on a hyperlink that is in a tiny font in order to view the terms. All of these decisions must precede the child actually attempting to understand the terms of the agreement itself. This more extensive online literacy process means that a child's digital literacy may fall far short of a child's print-based literacy.

The result is that children act online within a "bounded rationality" and "satisfice"—that is, choose outcomes that "suit their purposes but that are not necessarily the optimal outcomes."⁷³ Simply put, children freely accept online agreements because they *want* to use websites; they often do so without realizing that they are entering into a contract—let alone realizing that they do not understand the meaning or implications of its terms.

Beyond the impact of digital literacy on the contract formation process, children's "deep reading" skills are also inferior online, limiting children's understanding of digital text.⁷⁴ Deep reading refers to a reader's ability to

71. Warschauer & Ware, *supra* note 65, at 215; see also Bridget Dalton & C. Patrick Proctor, *The Changing Landscape of Text and Comprehension in the Age of New Literacies*, in *HANDBOOK OF RESEARCH ON NEW LITERACIES*, *supra* note 65, at 297–98 (discussing the effects of the nonlinear, multimodal, visual, interactive, and unbounded nature of digital reading and its implications for how to "understand understanding").

72. Denise E. Agosto, *A Model of Young People's Decision-Making in Using the Web*, 24 *LIBR. & INFO. SCI. RES.* 311, 311 (2002).

73. *Id.* at 312. See also *infra* Section III.B.2 for an analysis of why children who satisfice should receive protection from contracts when adults who act similarly do not.

74. Maryanne Wolf & Mirit Barzillai, *The Importance of Deep Reading*, *EDUC. LEADERSHIP*, Mar. 2009, at 32, 36.

engage in sophisticated text translation and comprehension processes.⁷⁵ It takes children years to develop these skills and their development is undermined by the emphasis of digital media on providing immediate information that affords instant gratification and relies on a media-driven rather than text-based cognitive set.⁷⁶ The emphasis of digital text on easily accessible online sources engenders “passive” interactions with online content that discourage deliberation in both reading and thinking.⁷⁷ Digital text therefore pushes back against deep reading skills, leading to “more easily ‘deluded’” readers.⁷⁸ At the same time, children lack the “executive, organizational, critical, and self-monitoring skills” to deconstruct such text, so they are especially susceptible to being led astray by unknown terms.⁷⁹

Our concept of what it means to “understand” digital text is still evolving as scholars attempt to integrate “knowledge of reading comprehension based on print technology and the world of books with our emerging knowledge of comprehension in new literacies spaces such as hypertexts and [websites].”⁸⁰ Current literature suggests that “explicit instruction” focused on “comprehension processes in online reading” must be accompanied by traditional print-text reading development to ensure that children attain fundamental “deep-reading” literacy.⁸¹ Therefore, until our education system truly embraces the convergence of deep-reading and digital literacy, we must remain suspect of children’s understanding of online information.

B. *Children’s Susceptibility to Online Advertising*

Children’s online vulnerability extends not just to their limited ability to understand and process online information but also to their difficulty paying attention to relevant information. Children often have trouble identifying relevant content online because they get distracted by peripheral imagery.⁸² Moreover, many children fail to identify the differences between actual content and advertising.⁸³ With the commercialization of the internet,⁸⁴ children’s susceptibility to online advertising and the ease of e-commerce are key issues for contract lawyers, corporate executives, and marketing agencies alike.

75. These processes include “inferential and deductive reasoning, analogical skills, critical analysis, reflection, and insight.” *Id.* at 33.

76. *See id.* at 32.

77. *Id.*

78. *Id.* at 35.

79. *Id.*

80. Dalton & Proctor, *supra* note 71, at 297.

81. Wolf & Barzillai, *supra* note 74, at 37.

82. Matthew S. Eastin et al., *Children of the Net: An Empirical Exploration into the Evaluation of Internet Content*, 50 J. BROADCASTING & ELECTRONIC MEDIA 211, 212–14 (2006).

83. *Id.*

84. *See* Bettina Fabos, *The Price of Information: Critical Literacy, Education, and Today’s Internet*, in HANDBOOK OF RESEARCH ON NEW LITERACIES, *supra* note 65, at 839–40.

Although people originally conceived of the internet as a democratic environment—a creative commons different from existing commercial mass media in its ability to foster free expression—the 2000s witnessed the internet’s recasting as a forum for commercial entertainment and business.⁸⁵ Search engines such as Yahoo! and Google have transformed from information-navigating services that relied on revenue from syndication to conglomerates that generate revenue through paid advertisements and fees for search prioritization.⁸⁶ In 2011, internet advertising revenue in the United States totaled \$31.74 billion, a 22% increase from 2010; meanwhile, 47% of this advertising revenue came from the use of search engines and 22% from the use of display and banner advertisements.⁸⁷ Notably, 22% of 2011 advertising revenue (\$7.1 billion of \$31.7 billion in total 2011 advertising revenue) came from retail advertisers.⁸⁸ In addition, websites routinely track user interests so that they can target advertisements and attract consumer attention.⁸⁹

This commercialization of the internet does not distinguish between child and adult users. In fact, advertising is increasingly directed at children.⁹⁰ As early as 2000, more than 67% of child-oriented websites were supported by advertising.⁹¹ And 80% of teens ages twelve through seventeen use online social networking websites such as Myspace or Facebook⁹² (websites that rely heavily on advertising revenue and targeted advertisements), while 48% use the internet for online shopping.⁹³

85. *Id.*

86. *Id.* at 851. For example, Google AdWords allows any business to create advertisements and “choose keywords” associated with the business so that when people search on Google, the “ad may appear next to or above the search results.” *Advertise Your Business on Google*, GOOGLE ADWORDS, <http://www.google.com/ads/adwords2/#tab0=0> (last visited Apr. 5, 2013).

87. INTERACTIVE ADVERTISING BUREAU, IAB INTERNET ADVERTISING REVENUE REPORT 12 (2012), available at http://www.iab.net/media/file/IAB_Internet_Advertising_Revenue_Report_FY_2011.pdf.

88. *Id.* at 7, 15. This represents the largest category of internet advertisement spending, followed by telecom company advertisements. *Id.* at 15. The leading U.S. internet advertiser, IAC/Interactive, expended \$316.2 million in 2011, while other top spenders included AT&T (\$245.7 million), Verizon (\$230.3 million), Amazon.com (\$199.8 million), and eBay (\$173.2 million). *Kantar Media Reports U.S. Advertising Expenditures Increased 0.8 Percent in 2011*, BUS. WIRE (Mar. 12, 2012, 8:00 AM), <http://www.businesswire.com/news/home/20120312005272/en/Kantar-Media-Reports-U.S.-Advertising-Expenditures-Increased>.

89. Dalton & Proctor, *supra* note 71, at 297–98 (noting that digital text can “read the reader,” collecting information through users’ interactions with websites and offering choices of content and products accordingly).

90. Louis J. Moses & Dare A. Baldwin, *What Can the Study of Cognitive Development Reveal About Children’s Ability to Appreciate and Cope with Advertising?*, 24 J. PUB. POL’Y & MARKETING 186, 186 (2005).

91. Lucy L. Henke & Gwen Fontenot, *Children and Internet Use: Perceptions of Advertising, Privacy, and Functional Displacement*, J. BUS. & ECON. RES., Nov. 2007, at 59.

92. *Trend Data (Teens)*, PEW INTERNET, <http://pewinternet.org/Static-Pages/Trend-Data-%28Teens%29/Online-Activites-Total.aspx> (last updated May 2012).

93. *Id.*

Developmentally, children should be capable of recognizing the purpose of advertising by the age of three.⁹⁴ And between the ages of six and eight, most children develop an understanding of bias in advertising and the promotional intent of the advertiser.⁹⁵ While children may be conceptually competent, however, they may not apply this understanding online because doing so requires the use of executive-function skills that undergo considerable development throughout childhood and adolescence.⁹⁶

The cognitive abilities associated with executive functioning include inhibitory control, impulse control, resistance to interference, selective attention, and focused attention.⁹⁷ Development of these skills is tied to the “maturation of the prefrontal cortex of the brain,” which is the last region of the brain to develop.⁹⁸ As a result, when engaged online, children are more likely to demonstrate poor self-control, impulsivity, poor judgment in decisionmaking contexts, difficulty in planning ahead, and a failure to integrate knowledge with future goals.⁹⁹

In addition, children are susceptible to the “serendipity effect,”¹⁰⁰ meaning that when something on a website piques a child’s interest or attracts his attention, the child becomes distracted and motivated to satisfy his new interest. Once motivated, the child is far more likely to forget his initial web-navigating intentions and to navigate solely with the new goal in mind.¹⁰¹

Consequently, children’s immature executive-function skills and distractibility make them vulnerable to online advertisements. Children can be “perceptually seduced” by salient and pleasing audiovisual effects.¹⁰² And “even if they have processed an advertisement effectively,” children may create accounts, accept terms, or engage in purchases “against their better judgment.”¹⁰³ Rather than just creating an account on Facebook, a child may then be enticed to play or download games like FarmVille or Candy Crush Saga. In comparison, adults are often more immune to many advertising tactics and have the benefit of product experience.¹⁰⁴

In accepting the use of these applications, a child accepts the third-party terms of service that appear in a tiny hyperlink at the bottom of the information page touting the game’s features. Through these terms of service, the

94. Moses & Baldwin, *supra* note 90, at 194.

95. *Id.*

96. *See id.*

97. *Id.*

98. *Id.*

99. *See id.*

100. Kimberly A. Lawless & P.G. Schrader, *Where Do We Go Now? Understanding Research on Navigation in Complex Digital Environments*, in HANDBOOK OF RESEARCH ON NEW LITERACIES, *supra* note 65, at 267, 284.

101. *Id.*

102. Moses & Baldwin, *supra* note 90, at 195.

103. *Id.* at 194; *see also* Lawless & Schrader, *supra* note 100, at 277 (highlighting that children’s navigation decisions align with their areas of interest).

104. *See* Moses & Baldwin, *supra* note 90, at 195.

child represents that he is “at least 13 years old” and that, if he is “between 13 years and 18 years old, [his] legal guardian has reviewed and agrees to [the] terms.”¹⁰⁵ Furthermore, the child acknowledges that he can only purchase any virtual currency associated with the game if he is “at least 18 years old.”¹⁰⁶

The psychology of children’s responses to online advertisements reveals that children are far more likely than adults to be tempted and distracted by online advertisements that bombard them with commercial opportunities and attractive websites. Furthermore, children are also far less capable of understanding the terms of these websites or of performing the critical analysis needed to make decisions in the “websphere” (such as agreeing to a website’s terms of service or making an account to access products and web services).¹⁰⁷ As a result, children are effectively induced into engaging with websites—ones that include hidden agreements attesting that the user has the capacity to contract or is over the age of eighteen—without understanding the potential implications of their activities.

III. MISREPRESENTATION-OF-AGE STATUTES AS AN OUTDATED DEFENSE

Unfortunately, the current state of the infancy doctrine is insufficient to offer children the full protection they need online. Several states have misrepresentation-of-age statutes.¹⁰⁸ These statutes prevent children from disaffirming contracts where they misrepresented that they were of the age of majority and the other party had a “good reason to believe that the minor was capable of contracting.”¹⁰⁹

Section III.A argues that courts should either limit misrepresentation-of-age statutes in their application to children’s online contracts or not apply these statutes to children’s online contracts at all because the need to protect children online outweighs the policy considerations behind such

105. *Games on Facebook—Terms of Service*, KING, <http://candycrush.king.com/legal/facebook/tos.jsp> (last updated Dec. 6, 2011); see also *Terms of Service*, ZYNGA, <http://company.zynga.com/legal/terms-of-service> (last updated Sept. 30, 2011) (“If you are between the ages of 13 and 17, you represent that your legal guardian has reviewed and agreed to these Terms. . . . You shall not create an Account or access the Service if you are under the age of 13 You agree to pay all fees and applicable taxes incurred by you or anyone using an Account registered to you.”).

106. KING, *supra* note 105.

107. See discussion *supra* Section II.A.

108. See, e.g., IOWA CODE § 599.3 (2011); KAN. STAT. ANN. § 38-103 (2000); MICH. COMP. LAWS § 600.1403 (1979); UTAH CODE ANN. § 15-2-3 (LexisNexis 2009); WASH. REV. CODE § 26.28.040 (2012).

109. 5 WILLISTON & LORD, *supra* note 3, at § 9:22. Outside the context of these statutes, though, a minor is generally not precluded from asserting the infancy defense when he has misrepresented his age. *Id.* Some states, however, have judicially rejected this rule. *Id.* This Note will just focus on statutory exceptions. See Preston, *supra* note 18, at 248–52, for a discussion of misrepresentation-of-age defenses under estoppel, arguing that estoppel principles require “justified,” “good faith” reliance, so minors’ online contracts should remain disaffirmable because OSPs fail to take adequate precautions to verify users’ ages. See also discussion *infra* Section III.B.

statutes. Section III.B then rebuts arguments that courts should find the misrepresentation-of-age defense more applicable to online contracts because of the difficulty of determining age online and because children's decisionmaking online is functionally similar to that of adults.

A. *Misrepresentation-of-Age Statutes in the Online Forum*

The language of misrepresentation-of-age statutes commonly provides that a minor cannot disaffirm an agreement when he misrepresented his own age or acted as an adult when he engaged in business.¹¹⁰ Such a formulation suggests that these statutes were designed to protect adults who engage in business or consumer transactions with children. Furthermore, cases in which courts have applied the statutes reveal that courts have emphasized the "engaged in business" prong of the statutes to protect adults in significant face-to-face consumer transactions.¹¹¹ In finding that children misrepresented their age, courts have looked not only at visible representations of age but also representations about past contracts made, financial resources, and family and marital statuses. These statutes, however, preceded the explosion of the internet, especially the development of browsewrap and e-commerce,¹¹² and there have been no cases applying the statutes to children's online transactions.¹¹³

110. See, e.g., IOWA CODE § 599.3 ("No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to the minor's majority, or from the minor's having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting."); KAN. STAT. ANN. § 38-103 (substantially the same language); UTAH CODE ANN. § 15-2-3 (substantially the same language); cf. MICH. COMP. LAWS § 600.1403 (limiting the defense to where the minor misrepresented his age for the purpose of securing "goods, wares, merchandise or chattels" or "securing the loan of money").

111. E.g., *Pottawatomie Airport & Flying Serv., Inc. v. Winger*, 271 P.2d 754, 758 (Kan. 1954) (finding a bailment contract for an airplane binding on a minor who had a bank account, engaged in farming and raising cattle, and represented that he had purchased cars because the "[p]laintiff had good reasons to believe defendant capable of contracting and was mislead [sic] by defendant Winger's implied misrepresentations as to his age, and from his having engaged in business and handled his business affairs as an adult" (internal quotation marks omitted)); *Dillon v. Burnham, Hanna, Munger & Co.*, 22 P. 1016, 1018 (Kan. 1890) (finding that a minor's repeated misrepresentations of age to buy goods and secure credit satisfied the statutory requirement for the adult to be "deceived either by the minor's direct misrepresentation, or by implied misrepresentation by reason of his conduct in carrying on business as though he was legally capable of doing so"); *Harvey v. Hadfield*, 372 P.2d 985, 987 (Utah 1962) (explaining that the purpose of Utah's misrepresentation-of-age statute was not "simply to make the other party a judge of the abilities of the minor and to enable him to bind the latter if he thinks the minor is sufficiently intelligent and perspicacious that he should be bound by his contract. Its purpose is to protect the other party if the minor has engaged in business so that the other party, even though using ordinary caution and prudence, is nevertheless justifiably misled into believing that he is dealing with an adult capable of contracting").

112. See, e.g., KAN. STAT. ANN. § 38-103 (enacted 1868); MICH. COMP. LAWS § 600.1403 (enacted 1961); UTAH CODE ANN. § 15-2-3 (enacted 1898).

113. A WestlawNext search of the statutes' citing references conducted on September 29, 2012 revealed this information and also revealed that very few cases have applied these

The terms of service on most websites contain hidden attestations that users have the capacity—are of the legal age—to contract. Moreover, most “OSPs do not provide any warning that they plan to rely on such representations [of age tucked into the terms of service] or warn that to accept services if the representation is not true will result in consequences.”¹¹⁴ For example, the Yahoo! Kids website has a tiny hyperlink at the bottom of the page, which leads to the website’s “Terms of Service.”¹¹⁵ The Terms of Service then state, “In consideration of your use of the Yahoo! Services, you represent that you are of legal age to form a binding contract” The Terms then provide that “parents of children under the age of 13 who wish to allow their children access to the Yahoo! Services must create a Yahoo! Family Account” and that in making a family account, “you certify that you are at least 18 years old.”¹¹⁶ Similarly, Amazon.com only requires an email address to create an account; once created, the website immediately begins giving suggestions for purchases. Although the website never requires a user to represent his age, the website’s “Conditions of Use” state that it is intended only for adults ages eighteen or older.¹¹⁷

Online advertisements targeted toward children—whether express marketing by retail institutions or websites, or social media touting their services and gaming applications—lure children to create online accounts and to make online purchases.¹¹⁸ In performing these acts, children enter into legal agreements in which they make either express or implied representations that they meet the terms of service and therefore misrepresent their ages. Consequently, because of state misrepresentation-of-age statutes, children frequently and unwittingly enter into nondisaffirmable contracts through their online transactions.

statutes to any scenario within the last several decades. Moreover, these statutes seem to directly contravene the *Restatement (Second) of Contracts*, creating further uncertainty as to their current interpretation. See RESTATEMENT (SECOND) OF CONTRACTS § 14 reporter’s note cmt. c (1981) (“Traditionally, however the infant’s misrepresentation of age and the other party’s reasonable reliance upon it have not been considered.”).

114. Preston, *supra* note 18, at 248. Although Preston concludes that such hidden representations are harmless, Preston’s analysis relies on estoppel principles, *id.* at 248–50, which are arguably more stringent than the principles imposed by statute.

115. YAHOO! KIDS, kids.yahoo.com (last visited Apr. 5, 2013).

116. Yahoo! Terms of Service, YAHOO!, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last updated Mar. 16, 2012).

117. Conditions of Use, AMAZON.COM, https://www.amazon.com/gp/help/customer/display.html/ref=ox_signin_condition_of_use?ie=UTF8&nodeId=508088&pop-up=1 (last updated Dec. 5, 2012) (“Amazon does sell products for children, but it sells them to adults If you are under 18, you may use the Amazon Services only with involvement of a parent or guardian.”).

118. There has been a proliferation of credit and debit cards in the hands of children granting them previously untold purchasing power; websites now exist specifically dedicated to advertising credit cards for children and educating parents on their benefits. See Slade, *supra* note 9, at 633–34. Considering the difficulty for parents in monitoring their children’s internet use, the financial risks of children’s consumer behavior (either with their own credit cards or their parents’) are real. *Id.* at 636–37.

The age-old philosophy for allowing minors to void contracts—protecting them from both their own flawed judgment and adults or companies that may take advantage of their naïveté—holds especially true in the online context. The commercialization of the online forum, especially the funds expended by OSPs on advertisements targeting children, has rendered children more vulnerable both to their own poor judgment in making online accounts and, more significantly, to exploitation by websites that employ hidden terms and clickwrap. While there is societal value to merchants exploiting the convenience and efficiency of online transactions and boilerplate terms, and there is also the risk that, in some instances, applying the infancy doctrine would allow adolescents to “shirk[] responsibilities undertaken with full understanding and appreciation of their acts,”¹¹⁹ the current framework suggests that OSPs are not deterred by the risks of children disaffirming their contracts.¹²⁰ Therefore, the heightened vulnerability of children online and the risk that courts will bind them to oppressive terms and improvident purchases should outweigh the need to protect the adults doing business with them.

The online environment does not align with the commercial context within which these statutes were promulgated, where agreements included the physical assessment of age and investigation into capacity to contract by way of financial, employment, and prior-experience verification. Consequently, courts should not blindly or strictly apply misrepresentation-of-age statutes to children’s online agreements.

B. *Deconstructing Arguments Against the Doctrine*

Although this Note and much recent scholarship call for a revitalization of the infancy doctrine,¹²¹ others claim that the infancy doctrine is outdated, particularly in the online world.¹²² Section III.B.1 rebuts the argument that OSPs need misrepresentation-of-age statutes to provide protection from inadvertently contracting with minors because of the difficulty of verifying age online. Section III.B.2 critiques suggestions that, in the modern contract era, adults exhibit similar limits on their cognitive assent to contracts as do minors, so there is no justification for giving minors a “protective shield.”¹²³ This Section concludes that not only do these arguments fail to account for the underlying policy reasons that still support the infancy defense but they

119. Daniel, *supra* note 2, at 257.

120. *But cf. id.* at 258 (arguing that, because merchants rely on children as a large segment of the consumer pool, the infancy doctrine risks denying society “access to an expanding world of e-commerce”).

121. *See, e.g.,* Preston & Crowther, *supra* note 12; Slade, *supra* note 9.

122. *See, e.g.,* Cunningham, *supra* note 2, at 292–94 (contending that minors are not naïve, and that, as consumers in the marketplace, they may have capacity to contract whereby an “overbroad infancy doctrine will be depriving legitimate consumers of access to the marketplace”); Daniel, *supra* note 2, at 241 (“To effectively advance electronic commerce, the lack of minor accountability regarding contractual obligations must be reexamined.”).

123. Daniel, *supra* note 2, at 251.

also exemplify why misrepresentation-of-age statutes are incongruent with the online transactions of minors.

1. Inadequacy of Age-Verification Techniques

Arguments that allowing minors to disaffirm online contracts stymies the efficient development of e-commerce focus on the difficulty of verifying children's ages online.¹²⁴ Admittedly, investigating age is more difficult online. OSPs cannot directly observe whether the user who is accepting their terms appears to be a minor. And although concerns for child safety online have led advocates to seek age-verification technology, there is a general consensus among artificial-intelligence specialists, web developers, and online merchants that age verification is ineffective.¹²⁵

At the same time, children make up a large segment of the online market, generating advertising and commercial revenue. This potential for financial gain discourages companies from actively investigating the age of web users and undermines the policy behind misrepresentation-of-age statutes in protecting adults who are misled into contracting with minors. OSPs derive substantial advertising revenue and long-term brand recognition by attracting child users.¹²⁶ For example, the more children that access websites such as Facebook, the more websites can tailor advertisements to the children's interests and the "more potential advertising dollars can be generated."¹²⁷ These websites increasingly stake their future profits on their ability to lure and retain the child market.¹²⁸

This profit potential motivates many websites' resistance to federal legislation regulating the use of and access to children's information online.¹²⁹ It also provides companies with a disincentive to truly try to verify the age of their users to avoid contracting with children, let alone to implement the expensive and cumbersome systems of verifying credit cards and driver's

124. See *id.* at 257.

125. Nicole Perloth, *Big Hurdles in Verifying Ages Online*, N.Y. TIMES, June 18, 2012, at B1, available at http://www.nytimes.com/2012/06/18/technology/verifying-ages-online-is-a-daunting-task-even-for-experts.html?_r=2&emc=eta1& (outlining proposed methods of verification ranging from voice recordings or fingerprint tracers to a national database).

126. Somini Sengupta, *Groups Urge Facebook Not to Aim Ads at Children Under 13*, N.Y. TIMES BITS BLOG (June 18, 2012, 6:36 PM), <http://bits.blogs.nytimes.com/2012/06/18/groups-urge-facebook-not-to-aim-ads-at-children-under-13/?emc=ETA1>.

127. Emily Bazelon, *The Young and the Friendless*, N.Y. TIMES, Oct. 16, 2011 (Magazine), at 15, available at http://www.nytimes.com/2011/10/16/magazine/why-facebook-is-after-your-kids.html?_r=0.

128. See *id.* For example, Facebook has been in negotiations with Disney to allow children onto its website, and it is seeking to expand its platform for targeting the "fast-growing market for children's games." Anton Troianovski & Shayndi Raice, *Facebook Explores Giving Kids Access*, WALL ST. J., June 4, 2012, at A1, available at <http://online.wsj.com/article/SB10001424052702303506404577444711741019238.html>. In 2011, 12 percent of Facebook's revenue—\$3.7 billion—came from its share of revenue from interactive games like FarmVille. *Id.*

129. See Bazelon, *supra* note 127.

licenses that some industries use to confirm the online identities of consumers.¹³⁰ Consequently, the majority of websites do very little in terms of age verification.¹³¹ While some websites ask users to input their date of birth, many just rely on the hidden terms in their conditions of use by which users “acknowledge” that they are over eighteen years old or old enough to enter into the agreement.¹³² If these hidden acknowledgements are sufficient to constitute a misrepresentation for the purpose of misrepresentation-of-age statutes, then OSPs can easily draft nondisaffirmable contracts that impose oppressive and onerous contract requirements on unsuspecting children—and they have no incentive not to!

Instead of “see[ing] the risk of contracting with minors and their unfettered ability to disaffirm the transaction as outweighing the benefits of readily engaging in e-commerce,”¹³³ the feeble attempts made by OSPs to avoid contracting with minors suggest that OSPs have accepted the inherent risks in these transactions.¹³⁴ In light of this behavior by OSPs, the difficulty in online age verification is insufficient to outweigh the infancy doctrine’s substantial policy interest in protecting children online from misguided agreements.¹³⁵

2. Bounded Rationality in an Unbounded World

Despite the fact that rational decisionmaking has always been touted as a fundamental principle of mutual assent, research has revealed that most adults do not make fully reasoned, purely rational choices. Instead, they act within a “bounded rationality.”¹³⁶ Most contracting parties place voluntary limits on their cognition by “fail[ing] to become . . . fully-informed market participant[s]”; they “informally weigh[] the costs associated with obtaining and processing all relevant information against the foreseeable risks of having to deal with an undesired event.”¹³⁷ Since both adults and children “are likely to act with a lack of full knowledge concerning all available options,” some scholars have concluded that “no apparent difference exists between the actual behavior of adults and minors to warrant” protecting children through the infancy doctrine.¹³⁸

Although adults may not be the rational decisionmakers that classical theorists once contemplated, that does not mean that adults and children are

130. Perloth, *supra* note 125 (noting measures taken by the pornography industry to verify age).

131. Preston, *supra* note 18, at 250–51.

132. See discussion *supra* Section III.A (using Amazon.com and Yahoo! as examples of websites that target children but do very little to verify their age).

133. Daniel, *supra* note 2, at 257–58.

134. Preston, *supra* note 18, at 250–51.

135. See Slade, *supra* note 9, at 625.

136. Agosto, *supra* note 72, at 312.

137. Daniel, *supra* note 2, at 250–51.

138. *Id.* at 251.

in the same decisionmaking category. Adults have a greater “market sensibility,” so, when making decisions online, they perform more sophisticated cost–benefit analyses with greater consideration of the potential pitfalls.¹³⁹ In contrast, “[c]hildren are less knowledgeable about the real world,” so they “cannot evaluate the legitimacy of . . . [i]nternet content” or know based on experience that they should consider fine print or be skeptical of online terms.¹⁴⁰

Furthermore, children’s lack of experience ties directly into their digital illiteracy, limiting their decisionmaking abilities and understanding of online agreements.¹⁴¹ While an adult’s cost–benefit analysis may include a superficial click on the terms-of-service hyperlink or a presumption that the terms will include warranty disclaimers or limits on remedies, it is far less likely that a child’s cost–benefit analysis will consider the possibility of such restrictions, let alone age limits.

We hold adults to contracts that require little affirmative manifestation of assent, contain few bargained-for terms, and are replete with practically foreign legalese relating to arbitration provisions, jurisdiction, venue, and injunctive relief; nonetheless, this does not mean that society would choose to enforce similar contracts against children, who are inherently more naïve and impulsive.¹⁴² Society has historically placed greater responsibility on adults to understand the world around them and to be accountable for their decisions.¹⁴³ Consequently, although adults are more vulnerable when acting online than in traditional face-to-face transactions, the vulnerability of adults does not mean that we should remove protections for children. The infancy doctrine’s policy of protecting minors remains valid.

IV. LEGISLATIVE REVIEW OR JUDICIAL RESOLUTION

So far, this Note has argued for the continued relevance of the infancy doctrine as well as for a reappraisal of the application of misrepresentation statutes to children’s online contracts. That misrepresentation-of-age statutes have rarely been applied in recent years¹⁴⁴ further suggests that they may be antiquated and in need of refining in the internet era.¹⁴⁵ Alternatively, the

139. See Slade, *supra* note 9, at 629.

140. Eastin et al., *supra* note 82, at 211.

141. See discussion *supra* Section II.A.

142. Slade, *supra* note 9, at 628–32.

143. See *id.* at 631 (“[A]dults are expected to accept the risks of their economic pursuits, to research answers, to consult financial planners, and to otherwise ensure that they are getting a fair deal.”).

144. Based on March 16, 2013 WestlawNext searches of the citing references for IOWA CODE § 599.3 (2011), KAN. STAT. ANN. § 38-103 (2000), and UTAH CODE ANN. § 15-2-3 (LexisNexis 2009), there are twenty-two cases citing Iowa’s misrepresentation-of-age statute (the most recent in 1955), five cases citing Kansas’s misrepresentation-of-age statute, and three cases citing Utah’s misrepresentation-of-age statute.

145. Cf. Preston & Crowther, *supra* note 12, at 67 n.101 (“Like most well-defined doctrines, the infancy doctrine was most frequently litigated and discussed while its parameters

lack of disputes with respect to online services may reflect the facility with which OSPs can cancel minors' accounts, use their position to persuade minors that they have no realistic remedy, incorporate the cost of doing business with minors by absorbing the occasional voided contract, or settle suits privately and avoid drawing attention to the infancy doctrine.¹⁴⁶ All these reasons for the lack of application of these statutes exemplify the very vulnerability of minors online that the infancy doctrine was intended to address.

This Part proposes potential resolutions to the application of these statutes in light of the increased vulnerability of children online. Section IV.A suggests the potential for state legislatures to reformulate these statutes as they apply to children's online transactions. Section IV.B argues that, currently, a judicial resolution may be more effective and appropriate in protecting children online.

A. Legislative Potential

The most obvious remedy to state misrepresentation-of-age statutes would be a legislative solution. Unlike common law jurisprudence, which is malleable but slow to change, legislatures are poised to make policy choices, which, in this case, would include analyzing normative questions at the intersection of law and child psychology.¹⁴⁷ In deciding what children are "capable of doing" and in determining the policy values inherent in children's legal competency, legislatures, unlike courts, can hold committee hearings, receive testimony from psychologists and legal scholars, and have an overarching debate about the application of a statute.¹⁴⁸ Thereby, the legislature can thoughtfully examine whether children's added vulnerability and the ease of age misrepresentation online outweighs the policy behind the current statutes in defending adults from the occasional child seeking to defraud them.

This Section evaluates two potential legislative solutions: (1) a bright-line rule that misrepresentation-of-age statutes apply to adolescents' online contracts but not to those of infants and (2) a rule-of-reason approach that evaluates the context surrounding a child's misrepresentation of his age and whether OSPs have undertaken a sufficient inquiry to have reason to believe the child's representation that he was old enough to enter into the agreement. It then concludes that there is insufficient legal or political momentum for a legislative solution on the horizon.

The first proposal would be to create split misrepresentation-of-age statutes that have separate standards for childhood (applying to children under

were being developed. With the recently changed legal landscape, the doctrine needs to be reapplied rather than redefined.").

146. *Id.* at 67–71.

147. See Cunningham, *supra* note 2, at 370–74 (arguing that "[t]he law of children is particularly suited for resolution by legislatures" and proposing the development of a Model Children's Code).

148. *Id.* at 373.

thirteen years of age) and adolescence. Such a resolution would allow legislatures to balance the policy considerations behind the infancy doctrine with the policy considerations behind the misrepresentation statutes¹⁴⁹ by applying the misrepresentation statutes only to adolescents, who are at least more literate and less impulsive than children.¹⁵⁰

Redrafting misrepresentation statutes to presumptively not apply to pre-adolescent online contracts would provide a clear signal that the legislature wants the infancy doctrine to apply online and that its policy underpinnings may outweigh the economic interests of e-businesses and website providers. At the same time, by continuing to apply misrepresentation-of-age statutes to adolescents, who are more likely to make (or are more responsible for) knowledgeable misrepresentations of their age, the legislature would not completely abandon the policy interests behind these statutes. Such an approach would also confer benefits of “certainty and administrative efficiency”¹⁵¹ by allowing OSPs to structure their online transactions knowing that renegeing adolescents may be found responsible if they breach the terms. But the common concern that bright-line rules result in “arbitrary line drawing”¹⁵² may be especially resonant here. As discussed in Part II, our understanding of children’s digital literacy is still evolving and there are far more factors affecting children’s digital comprehension and decisionmaking than print-based comprehension. Because this area is unresolved, it is difficult to validly propose an age at which society should expect adolescents to sufficiently understand the potential implications of boilerplate and to be held responsible for their online forays.

Alternatively, misrepresentation-of-age statutes could be amended to specify or describe what, in the online context, would be considered a sufficient inquiry into a user’s age by an OSP to give it “good reason to believe the minor capable of contracting.”¹⁵³ If state legislatures decided that browserwrap or clickwrap terms of service with hidden age representations are insufficient, then the statutes could be amended to require children to have affirmatively stated their age. Depending on states’ evaluations of the competing policy interests, states could then draft statutes so that any affirmative misrepresentation precludes a child from disaffirming a contract or so that there is a rebuttable presumption that the child or parent has been put on notice of the legal significance of the agreement and so cannot disaffirm.

149. See Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1302–04 (2000) (arguing that adolescent contracts should be binding because of the relative abilities of adolescents and the underlying accountability of contract law).

150. For a proposal that the law should “distinguish between young children and adolescents and operate under a system of rebuttable presumptions of capacity,” see Daniel, *supra* note 2, at 267.

151. Slade, *supra* note 9, at 626.

152. *Id.*

153. IOWA CODE § 599.3 (2011).

When considering the inducement effect of online advertisements and websites targeting children,¹⁵⁴ however, even this proposal may be insufficient to fully embrace the traditional policy objective of protecting children from companies that would take advantage of them in the marketplace.¹⁵⁵ While the ease with which children can select the wrong date hardly seems sufficient for OSPs to believe a user's selected age, the current paucity of age-verification technology limits the available options. Still, at least requiring an affirmative misrepresentation of age would put children on notice that there may be consequences or implications from using a false age.

A context-specific statute would likely also face resistance from OSPs, who already tout the difficulty of truly determining the age of users.¹⁵⁶ Such statutes inherently lack the predictability of a bright-line legal rule and limit the ability of companies to "know what the likely results are when they transact with minors."¹⁵⁷ As a result, a context-specific statute would rely significantly on judicial application to define the contours of what constitutes a sufficient inquiry.

Nevertheless, while warranted, it is unlikely that a legislative solution will be forthcoming. Although it is generally acknowledged that children are vulnerable online, most policy and legislative attention has focused on questions of children's privacy—in particular, on preventing websites from collecting the personal information of children under thirteen years of age and protecting children from sexual predators.¹⁵⁸ Even this limited federal legislation has resulted in protracted debate with strong voices on both sides and the need for repeated rulemaking and comment periods with little resolution.¹⁵⁹ At the same time, the paucity of recent infancy doctrine cases suggests that there is little momentum to drive a review of misrepresentation-of-age statutes.¹⁶⁰ And the size and value of the internet market, generating billions of dollars in revenue per year,¹⁶¹ make it unlikely that attempts to

154. See discussion *supra* Section II.B.

155. See Slade, *supra* note 9, at 614.

156. See discussion *supra* Section III.B.1.

157. Slade, *supra* note 9, at 626.

158. See, e.g., Children's Online Privacy Protection Rule, 16 C.F.R. § 312.2 (2012) (regulating what information websites cannot obtain or track from children under thirteen).

159. See, e.g., DANIEL CASTRO, INFO. TECH. INNOVATION FOUND., *Comments of the Information Technology and Innovation Foundation in the Matter of Proposed Modifications to the Children's Online Privacy Protection Rule* (2012), available at <http://www2.itif.org/2012-ftc-coppa-filing.pdf> (arguing that creating more restrictions on the collection of information from children hinders benefits from targeted advertising and limits the development of child-directed websites); Sengupta, *supra* note 126 (discussing groups such as Consumers Union and the Center for Digital Democracy, which call for restrictions on child-collected information, and the institution of parental safeguards, which would allow monitoring of children's information online).

160. Cf. Preston & Crowther, *supra* note 12, at 67–70, 77 (noting that, in the last ten years, there have been only 128 reported cases addressing the infancy doctrine because the doctrine is not well known and because cases frequently settle but predicting that if awareness of the doctrine became more widespread, suits may arise and serve as a deterrent).

161. See INTERACTIVE ADVERTISING BUREAU, *supra* note 87, at 12.

amend or rescind these statutes as they apply to online contracts would receive substantial political or business support.

B. *Judicial Proposal*

Consequently, especially in the short term,¹⁶² it is likely that the judiciary must conduct any reinterpretation of misrepresentation-of-age statutes. The obsolescence of misrepresentation-of-age statutes and the lack of jurisprudence applying them¹⁶³ begs for the modern judiciary to reinterpret and reapply them in the online context.¹⁶⁴

The most common formulation of misrepresentation-of-age statutes prevents disaffirmance where the other party believed the minor capable of contracting “on account of the minor’s own misrepresentations as to his majority.”¹⁶⁵ It is a canon of statutory interpretation that “[w]ords that are not terms of art and that are not statutorily defined are customarily given their ordinary meanings, often derived from the dictionary.”¹⁶⁶ The ordinary meaning of “misrepresentation” is the making of a “false or misleading representation . . . usually with an intent to deceive or be unfair.”¹⁶⁷ The statutory text thus allows for judges to assess the extent to which a child had the requisite intent. And judges may require a showing that a child made an “affirmative or definite statement intended to mislead.”¹⁶⁸

Judges should, therefore, conduct a factual analysis into whether a child may have been induced to enter into an agreement by advertisements or websites targeting children, as well as the extent of the child’s knowledge or understanding that he was forming a contract and lying about his age to do so. For example, a judge may find that a child who knowingly says that he is eighteen to create an online account was sufficiently knowledgeable and willful about the fact so as to disallow disaffirmance; in another instance,

162. As discussed, understanding of children’s digital literacy is still in its early stages, *see supra* Section II.A, and technology allowing for easy identification of users’ ages is still very developmental, *see supra* Section III.B.1.

163. *See supra* note 144 and accompanying text.

164. Insofar as old cases applying the statutes adopted a low standard for minors to misrepresent their ages, judges need not act similarly with online contracts. *Cf.* Timothy Schwarz, Comment, *Cases Time Forgot: Why Judges Can Sometimes Ignore Controlling Precedent*, 56 EMORY L.J. 1475, 1475–76 (2007) (arguing that ignoring precedent is a normal technique used by judges when the precedent gives different weight to values, so later courts can ignore the implicit rule of law without overruling the precedent).

165. *E.g.*, UTAH CODE ANN. § 15-2-3 (LexisNexis 2009).

166. YULE KIM, CONG. RESEARCH SERV., ORDER CODE 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 6 (2008).

167. *Misrepresent*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/misrepresent> (last visited Apr. 5, 2013).

168. *Friar v. Rae-Chandler Co.*, 185 N.W. 32, 34 (Iowa 1921).

however, a judge may find that a child who simply provided his email address to create an account or played online games was unaware that, in doing so, he had represented that he was eighteen and so lacked the requisite intent to deceive.¹⁶⁹

Since the plain text of the statute affords judges the opportunity to undertake a fact-heavy inquiry into whether a child *misrepresented* his age, courts will be able to examine and hear expert testimony regarding a number of matters: the child's history and experience online, the involvement and supervision of parents, the benefits provided by the OSP, the appearance of the website, the availability and presentation of the terms of service, and whether the website required the child to affirmatively state his age. One of the potential determining factors may be whether the child merely "accepted" a clickwrap or browsewrap agreement, as opposed to creating an account or entering into an e-commerce agreement that required him to actively select and purchase goods online.

Misrepresentation statutes also require that "the other party had good reason to believe the minor capable of contracting."¹⁷⁰ This demands that judges evaluate the circumstances surrounding a contract's formation and any indications that a child may have made to justify the other party's belief that the minor was capable of contracting.¹⁷¹ Historically, judges relied heavily on a combination of a child's written or oral representations of his age, as well as whether a child visually appeared to be old enough to contract.¹⁷² In one case, the failure of a party to make any inquiry into a child's age was

169. Of course, children's ability to create an email account to begin with may be limited by their age; however, an analysis of this topic is beyond the scope of this Note.

170. *E.g.*, UTAH CODE ANN. § 15-2-3.

171. *First Nat'l Bank of Titonka v. Casey*, 138 N.W. 897, 899 (Iowa 1912) ("[W]hether there was 'good reason to believe' [a] minor [was] capable of contracting necessarily must depend on the circumstances of each particular case."); *Thosath v. Transp. Motor Co.*, 240 P. 921, 921 (Wash. 1925) ("[I]n order to determine whether defendant's agent had good reasons . . . you should also take into consideration the appearance of the minor at the time of entering into the contract, and any and all other circumstances which surrounded the making of the contract at the time in question . . ." (quoting jury instruction) (internal quotation marks omitted)).

172. *See, e.g.*, *Homan v. Comstock*, 289 P.2d 362, 362 (Wash. 1955) (per curiam) (holding that the sellers of real property were justified in believing a minor to be of age when he represented that he was twenty-seven years old and was "a large, mature appearing young man" (internal quotation marks omitted)); *Lubin v. Cowell*, 170 P.2d 301, 308 (Wash. 1946) (refusing to allow disaffirmance where the child appeared to be twenty-five to twenty-six years old, did not advise the other party he was a minor, and certified that he was over twenty-one years old); *Stone v. Knutzen*, 265 P. 161, 161-62 (Wash. 1928) (upholding a trial court's conclusion that there was a justified reason to believe a child capable of contracting because the "trial court saw the appellant and was in far better position to state whether or not his representations as to his age, taken in conjunction with his appearance generally, were calculated to induce in the mind of the respondent the belief that [the child] was capable of contracting").

insufficient to prevent disaffirmance where the child did not realize that he was making a representation of his age.¹⁷³

Based on the lackluster and ineffective age verification measures taken by OSPs,¹⁷⁴ judges could easily find that an OSP did not have a “good reason” to believe that the other party was capable of contracting. The judicial inquiry is, however, inevitably complicated by the difficulty in visually evaluating a party’s age online. If a court interprets “good reason” too strictly, then there is the risk that it would be impossible for companies to enter into agreements with children online that are not at risk of disaffirmance, regardless of the intent behind a child’s misrepresentation. While a judge must plainly apply the statute, context and purpose must guide statutory meaning.¹⁷⁵ It would, therefore, be inapposite to adopt an application that completely ignores the statute’s stated policy interest in protecting adults who unwittingly enter into contracts with children.

Consider the two forms of online agreements emphasized in this Note: browsewrap and clickwrap agreements. It would not seem unreasonable for a judge to uniformly hold that an OSP is not justified in relying on age representations tucked away in the fine print of browsewrap agreements. In a browsewrap agreement, not only is there no inquiry by the OSP as to whether the child’s age is as “represented” in the agreement but there is also no affirmative statement by a child of his age; in fact, the child is likely entirely unaware that, in browsing the website, he made a representation of his age. In this scenario, the child is most vulnerable to the unsuspecting imposition of oppressive contract terms and the OSP most predisposed, as evidenced by its use of hidden age representations in passive agreements, to exploit this vulnerability.

The application to clickwrap agreements would likely be more fact specific. Clickwrap agreements require a child to affirmatively accept a website’s terms of service, so OSPs are more justified in relying on an agreement’s acceptance as an indication that the party can contract. Judges would be apt, however, to evaluate the appearance and interface of the website. If a website specifically targets children (through advertisements, audiovisual cues shown to attract children, or child-friendly content) or is popular with children (such as social media websites), then judges may be less inclined to find an OSP justified in relying on a child’s acceptance of the clickwrap terms. Judges could also distinguish between clickwrap agreements that make age a threshold question—by requiring users to first enter their age or agree that they are over the age of eighteen before subsequently accepting the actual terms—and those that simply offer “I accept” boxes and hide the age representation in the hyperlinked terms of service.

173. *Friar*, 185 N.W. at 34 (concluding that there was no good reason for a party to rely on a child saying that he had money in the bank for the purpose of buying a car because no questions were asked about the child’s age, and the child did not think that he was making a representation of his age).

174. See discussion *supra* Section III.A.

175. *KIM*, *supra* note 166, at 6–7.

As with any judicial resolution, the potential for such a fact-intensive, case-by-case inquiry could increase the judicial workload.¹⁷⁶ Additionally, there is no guarantee that it would resolve the uncertainty about the application of misrepresentation-of-age statutes online because “a minor’s rights and responsibilities are subject to the whims and assumptions of the particular factfinder who is assigned the minor’s case.”¹⁷⁷ Nonetheless, such a solution at least provides children with the opportunity to be protected by the infancy doctrine in spite of misrepresentation-of-age statutes.

CONCLUSION

Misrepresentation-of-age statutes are an outdated vestige of the classical contract era. They have no place in the digital world where OSPs actively target children as consumers and have no incentive to avoid contracting with them. The difficulties in determining age over the internet emphasize the mismatch between misrepresentation-of-age statutes and the modern reality of digital contracts. However, these difficulties do not warrant giving OSPs a blanket ability to enforce hidden terms on unwitting children. Rather, the greater bargaining power and financial benefits that OSPs derive from children’s participation in the online community underscore the need for a doctrine that continues to protect children. Although legislative solutions exist, they are unlikely to be forthcoming. The optimal solution, therefore, would be for judges to reinterpret misrepresentation-of-age statutes in the digital context. Judges are well positioned to apply the language of these statutes to online contracts in a manner that considers the heightened vulnerability of children online to oppressive contract terms, inadvertent age misrepresentations, and targeted advertisements.

176. See Cunningham, *supra* note 2, at 368.

177. *Id.*