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INFANTS' CONTRACTUAL DISABILITIES: DO MODERN SOCIOLOGICAL AND ECONOMIC TRENDS DEMAND A CHANGE IN THE LAW?

Contractual responsibility and disability of infants is one of the oldest and most firmly entrenched areas of the law. It is well known that infants' contracts are voidable and can be disaffirmed either during minority or after becoming an adult. Executed and executory contracts are both subject to this rule permitting infant disaffirmance, the chief exception being a contract for "necessaries" for which an infant must pay a reasonable value in quasi-contract upon disaffirmance. The only other exceptions to the rule permitting disaffirmance are statutory, or involve contracts which deal with duties imposed by law such as a "contract of marriage" (but not a contract to marry), or an agreement to provide for an illegitimate child.

Since the fifteenth century the law of infants' contractual responsibility has been virtually stagnant. This note will examine the reasons for the establishment of the age of majority at twenty-one, determine if this age was and is still a valid criterion for granting full contractual capacity, and explore possible solutions to the problems created in modern society by reason of the present posture of the law of infants' contractual responsibility. A judgment on the merits of any solutions must include a consideration of relevant social interests which are frequently in conflict. Society has a moral obligation to protect the interests of infants

1. 2 Williston, Contracts § 223 (3d ed. 1959).
3. Ibid.
5. See, e.g., Ind. Ann. Stat. § 18-2005 (Burns 1964) (excepting minor's checks from disaffirmance); Ind. Ann. Stat. § 28-5174 (Burns 1964 Supp.) (binding minors on their educational loans); Ind. Ann. Stat. § 59-1017 (Burns 1961) (providing that minor veterans and their spouses may not disaffirm loans made in pursuance of G.I. loan program). This piecemeal legislation indicates a recognition that exceptions are needed to the common law rules of infants' contracts.
6. 2 Williston, op. cit. supra note 1, § 228. The common law of England also excepted the king, mayors, dukes, and earls: 6 Bacon's Abridgment 104 (1876).
7. 2 Williston, op. cit. supra note 1.
8. One might guess that the figure twenty-one was arrived at by multiplying the magic numbers seven and three; however, the textual discussion seems to refute this. Why twenty-one was chosen over, say, nineteen, may well have had a purely superstitious base.
9. For several problems not treated in the discussion, see text accompanying note 11 infra.
from overreaching adults. But this protection must not become a straight jacket, stifling the economic and social advancement of infants who have the need and maturity to contract.\(^ {10} \) Nor should infants be allowed to turn that protective legal shield into a weapon to wield against fair-dealing adults.\(^ {11} \) It is in the interest of society to have its members contribute actively to the general economic and social welfare, if this can be accomplished consistently with the protection of those members unable to protect themselves in the market place.

There are two troublesome areas of the law of infants’ contracts which are not within the scope of this discussion. First, courts have tended to adhere to precedent more than the realities of modern society in determining the constituents of the class labeled “necessaries.” By way of illustration, no reported case has held an automobile to be a “necessary.” In one case\(^ {12} \) the court stated that the automobile is a “common necessity for the average workingman,”\(^ {13} \) but refused to hold it a “necessary” to the minor at bar (who was emancipated, working, about to be married, and living hundreds of miles from his family). It is submitted that realistic evaluation is needed in this area. However, as this discussion is an attempt to find practical solutions to the problems of infants who want and need to contract, and since any change in the definition of “necessaries” would do little to increase the over-all ability of an infant to find adults willing to contract with him,\(^ {14} \) extensive treatment of the “necessaries” problem is here omitted.

The second problem area which is without the scope of this note is misrepresentation of age by an infant to obtain contractual advantage.

\(^ {10} \) “Maturity” in this context means the ability to understand and appreciate the ramifications of a potential contract with an adult, i.e., the possession of reasoning power and judgment.

\(^ {11} \) For example, when a minor misrepresents his age to an adult dealing in good faith with him and later disaffirms the contract, the law should not give him its protection.

\(^ {12} \) Bowling v. Sperry, 133 Ind. App. 692, 184 N.E.2d 901 (1962). Also see, Perry Auto Co. v. Mainland, 229 Iowa 187, 294 N.W. 281 (1940); Chambers v. Dunmeyer Chevrolet Co., 74 Ohio App. 235, 58 N.E.2d 239 (1942). But cf. Ehlers v. Borgen, 185 Kan. 776, 347 P.2d 260 (1959), in which the minor defendant was the driver of an automobile in which plaintiff was injured. To enable him to plead the Kansas guest statute as a defense the minor attempted to disaffirm a “share the ride” agreement. The court held that “private transportation for the worker is now a necessity, and an agreement made by a minor for such transportation is . . . not subject to disaffirmance.” \textit{Id.} at 779, 347 P.2d at 264.

\(^ {13} \) Bowling v. Sperry, 133 Ind. App. 692, 698, 184 N.E.2d 901, 904 (1962).

\(^ {14} \) It is doubtful that a car dealer, for example, would want to take a chance that a court would hold that an automobile sold to a particular minor was a “necessary” to him. In fact, it is doubtful whether the dealer would want to risk becoming involved in a suit at all, even if there were a high probability that the automobile sold would be held a “necessary.”
This particular fraud is surprisingly prevalent in the reported cases and jurisdictions have worked out various solutions to protect the adult. These solutions are usually based either on estoppel of the infant to plead his non-age or on a subsequent action by the adult in tort for deceit. Although misrepresentation of age presents serious practical and theoretical problems, it is unrelated to socio-economic changes in society and therefore will not be discussed.

Who is an Infant, and Why?

An infant at common law, and in most jurisdictions today, is any person under the age of twenty-one years. It is generally assumed that the infant is protected by the law because it is presumed that all persons under the age of twenty-one years are incapable, due to their immaturity, of obtaining fair treatment at the hands of an adult. Although that

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15. One of the more recent examples is Mitchell v. Campbell and Fetter Bank, --- Ind. App. ---, 195 N.E.2d 489 (1964). See also cases cited infra note 16.

16. An early view, expressed in Sims v. Everheart, 102 U.S. 300, 313 (1880), was that misrepresentation of age was immaterial: "A conveyance by a minor is an assertion of his right to convey. A contemporaneous declaration of his right or age adds nothing to what is implied in his deed."

The following states allow an action against the minor in deceit: Colorado, (Doeunges-Long Motors, Inc. v. Gillen, 138 Colo. 31, 328 P.2d 1077 (1958)); Illinois, (Davidson v. Young, 38 Ill. 145 (1865)); Indiana, (Carpender v. Carpender, 45 Ind. 142 (1873)); South Carolina, (Beem v. McBrayer, 132 S.C. 72, 128 S.E. 34 (1925)); Wisconsin, (Wisconsin Loan & Finance Co. v. Goodnough, 201 Wis. 101, 228 N.W. 484 (1930)).


Four states have identical statutes which prohibit disaffirmance by the misrepresenting minor: IOWA CODE ANN. § 599.3 (1950); KAN. STAT. ANN. § 38-103 (1964); UTAH CODE ANN. § 15-2-3 (1953); REV. CODE OF WASH. ANN. § 26-28-040 (1961). There are also many statutes which remove the ability to disaffirm when the minor misrepresents his age in connection with certain contracts. See, e.g., IND. ANN. STAT. §§ 18-2006, 18-3127, and 18-2248 (Burns 1964), which deal with loans from banks and trust companies, industrial loan companies, and credit unions, respectively.

17. For example, if the minor is estopped to assert his non-age the full contract price is collectible by the adult regardless of whether the adult has overreached; there is no "reasonable-value" rule such as protects the minor who buys necessaries. If the adult is permitted an action in deceit, it would seem that he is merely enforcing the contract by indirect means when he is not permitted to do so directly, despite assertion to the contrary in the cases.

18. 2 WILLISTON, op. cit. supra note 1, § 224.

19. 15 VERNIER, AMERICAN FAMILY LAWS § 280 (1938).
presumption may be the reason for the continuance of infants' disabilities, it was not the sole reason for their establishment.

Infants' contractual disabilities have been known since Roman times.\(^{20}\) In Rome, the rationale was based on the immaturity of the infant, the test of maturity being: does he have both understanding and judgment as to acts in law, particularly in relation to property rights? The minor was presumed to have this judgment and understanding at age fourteen.\(^{21}\) This same age was adopted among the barbarians of Europe, where the rationale was, however, not maturity but the ability to bear arms.\(^{22}\) In England, before the Magna Carta, the age of majority was probably fifteen;\(^{23}\) however, by that time the age for the upper classes had been raised to twenty-one. There is evidence that this raising of the age was due not to a decrease in the maturity level of the youths of England, but to an increase in the weight of arms and armor and increased training necessary to use improved implements of war.\(^{24}\) One of the prime duties of a youth on coming of age was military service for his lord, and after the development of heavy chain mail, a callow fifteen-year-old did not have the strength required of a knight.\(^{25}\) In addition, the battles were being fought with greater frequency on horseback, which also required additional strength and training. That the increased strength required of a youth was a cause in the raising of the age to twenty-one is further illustrated by the fact that a ward in socage, a tenure generally unrelated to military duties, came of age at fifteen.\(^{26}\) When the military tenures were abolished in 1660, the age of twenty-one, having been used by the higher class lords and knights, was generally accepted by the other classes and the common law.

Therefore it seems that the age of twenty-one, which most American jurisdictions accept as the age of contractual capacity, was not based entirely on the maturation of youth, but largely on the practical military needs of the society in which youth lived. Indeed, it may be that from the standpoint of maturity the age of twenty-one was never a valid age for the fixing of capacity. Even if twenty-one were once a valid age to grant contractual capacity, it may be that the retention of that age in the 1960's is arbitrary and based only on long established tradition.

21. Full capacity, however, did not come until twenty-five years of age. 2 Sherman, Roman Law in the Modern World § 406 (3d ed. 1937).
22. James, op. cit. supra note 20, at 25.
23. Ibid.
25. 5 Bacon's Abridgment 101 (1876).
MATURITY OF YOUTH IN A COMPLEX SOCIETY

To determine the validity of retaining twenty-one years as the age of majority, one may look both to comparative statistics—from which certain conclusions may be drawn—and to the few available comparative sociological studies of maturity. In the statistical area, the most obvious change in society is the remarkable increase in the population of urban areas over rural in the past 150 years. This population increase in the urban centers has been accompanied by a change in the modes of living: whereas the young man in a rural area could gain business experience at an early age by helping his father with the management of the family farm, the modern city youth gains little such experience. Business life in the city is likely to be miles from the place of residence, and is a life into which the family of the breadwinner does not often enter. Because of his greater opportunity for business experience, the rural infant of the past may have been more knowledgeable and mature in contractual matters than the infant of today. This conclusion is supported by the fact that the economy of this century is vastly more complex than in the past. It takes much more time and study to be even reasonably competent to participate in modern business than it did in the eighteenth century. The magnitude of the most common modern business transaction is greater than all but the most infrequent of transactions of several centuries ago; nothing then could compare with the purchase of an automobile, a major appliance or a house full of furniture, except perhaps the purchase of land or a slave. Furthermore, the modern minor spends more time in attaining a formal education than did his counterpart of even three decades ago. He is thus isolated from the commercial world to a greater degree than if he were earning a living, and is likely to be less sophisticated in the

27. This would be an excellent field into which sociologists might venture. There are a number of studies which reach the rather obvious conclusion that maturity varies among individuals, and which give excellent criteria for determining the maturity of a given person, but few which examine maturity as related to age of youth today compared with the youth of bygone generations. See, e.g., Saul, Emotional Maturity (1960).

28. Whereas in 1790, 94.9% of the population of the United States lived in rural areas, by 1960 this figure had decreased to 30.1%. 1960 Census of the Population, vol. 1, part A, table 3.


30. In 1930, there were 1,101,000 students attending 1,409 institutions of higher learning. In 1960, this had increased to 3,216,000 students in 2,037 such institutions. 1964 Statistical Abstract of the United States 107. This represents an increase from 11% to 33% of the total number of youths of college age (18-21), which total remained relatively constant at nine million. 1960 Census, op. cit., supra note 28, table 157. In 1870, only 1.7% of the population aged 18 to 21 attended college. Historical Statistics of the United States, Colonial Times to 1957 211, ser. H-322.
ways of contract and business. Therefore, from the standpoint of the maturity of today's youth, the age of twenty-one might be too low an age to grant contractual capacity.

The few relevant sociological studies available point to the same conclusion: while the infant of today has more formal education than his grandfather, he probably has a lower level of maturity and sophistication than the former generations. Modern studies have shown that the average minor in his late teens is still very much in the developmental state of memory, judgment, reasoning, comprehension, invention, direction, and criticism. This development goes on at least into the early twenties.

An argument can thus be made that on the basis of the data presented above, the age of contractual capacity should be retained or even raised. This assumes, however, that maturity is the sole and deciding factor to consider in arriving at an age at which contractual capacity should begin.

There are several other factors which should enter into the determination of the proper age at which to begin contractual capacity, and after examining them, one might arrive at the conclusion that a fixed age is not the most appropriate method, at least as the sole determinate of capacity. Its main advantage may lie in the simplicity of administration provided by an arbitrary standard.

An interesting change has taken place in the commercial law relevant to this inquiry. In the years immediately after the formation of the basic concepts of the common law infants' disabilities doctrine, the harsh rule of caveat emptor prevailed. Parties to a contract were left to determine for themselves the fairness and desirability of their contracts within very wide limits. In such a situation, it is clear that any large group which lacked understanding of the ways of contract would need the protection of the law; one such group was infants. Extensive change has occurred

31. Although, as pointed out infra in text at note 42, today's minors spend more money than ever before, it is submitted that evidence of increased purchases is not evidence of increased commercial sense.


33. Brooks, Intellectual Development from Fifteen to Twenty-two, in Growth and Development: the Basis for Educational Programs (1939). The same author indicates that several generations ago, it was thought that this growth reached a saturation point in the early teens, with no growth thereafter. Indeed, the average adult in this country was thought to have a mental age between thirteen and fourteen years; a belief accepted by reputable psychologists and educators. It is interesting that the law of infants' contracts was not changed during the period that this belief was widespread.

34. Note the emphasis on the word "sole." If valid relationships can be found between capacity-in-fact and age for a significant number of infants, there is no objection to using age as a partial criterion for capacity. See text accompanying notes 58 and 63 infra.
in this century. In the Uniform Commercial Code, the buyer of goods, at least, has been given extensive protection from bad bargains, both in the extension of warranties\textsuperscript{35} and the power of the courts to void "unconscionable contracts or clauses."\textsuperscript{36} Stated in oversimplified terms, the law seems to be adopting the view that no one in this complex modern society, adults or minors, should be left completely alone to risk the fairness of the bargain into which he enters.\textsuperscript{37} Do minors, then, need the special protection which the law still provides, in the light of present day protection given to all consumers? The apparent purpose of denying capacity to minors is to protect them from unfair contracts; if the law provides remedies to the public generally from such contracts, it is at least arguable that the refuge of incapacity is no longer necessary for the protection of the infant. This assertion may be valid several decades hence. At present, though, the laws protecting the public from unscrupulous dealings are still in infancy themselves; it is doubtful that they have yet developed enough to cure all the problems presented in the field of infants' contracts.\textsuperscript{38} On the other hand, these laws may present an argument for the reduction of contractual age in certain cases where the protection required does not need to be as extensive as the complete withholding of contractual capacity.

Two final factors to consider in arriving at an age to begin contractual capacity are the infant's need to contract and the need of society to allow him to contract. On the latter point, recent surveys\textsuperscript{39} show that today's minors spend annually more than twelve billion dollars, and a sizable portion of this is on credit in the form of department store charge accounts. The business community obviously feels that the risk of dis-

\textsuperscript{36} Uniform Commercial Code § 2-302 (1963).
\textsuperscript{37} Even the tort law has begun to recognize this; see case annotations for Restatement, Torts § 395 (1965).
\textsuperscript{38} The increasing protection given by the law against unfair or one-sided bargains seems to be confined largely to the area of sales. Even in this area, it has been suggested that the unconscionable contract section of the U.C.C. is but a statutory expression of the existing prejudice among judges and juries against unfair bargains, and thus not a drastic assault on the citadel of freedom of contract. Bun, Freedom of Contract Under the Uniform Commercial Code, 2 B.C. Ind. & Comm. L. Rev. 59, 65 (1960). If this view is correct, it represents little improvement over the test expressed in Hume v. United States, 132 U.S. 406, 410 (1889), that to be voided because of unconscionability at law, a contract had to be one that "no man in his sense and not under a delusion would make on the one hand, and no honest and fair man would accept on the other." Compare 1 Corbin, Contracts § 128 (1951).

There is a considerable difference in the policy behind the protection of consumers and the protection of minors. Infants should be protected from any bargain which is not to their advantage while the protection afforded consumers in general may be no more than seeing that the contract does not work a definite disadvantage on them.

\textsuperscript{39} One of which was reported in Time Magazine, January 29, 1965, pp. 56, 57a.
affirmance is more than offset by the advantages to it and to the economy in allowing these sales.\footnote{40} One can only speculate on the additional amounts of money which would be put into the economy if all, or some, barriers to capacity were removed. Minors have more money to spend than ever before, and they are spending it in great volume on small items despite the restrictions\footnote{41} placed on their contractual capacity. Perhaps some method could be devised that would benefit the economy, bring the law into harmony with business practice, and make it easier for mature minors to make major purchases. Perhaps, with the increase in spending by today’s youth, eventually there will be problems of disaffirmance, with a consequent rash of litigation. It would be desirable if this can be foreseen and possibly prevented by providing a means whereby a minor’s need to contract could be satisfied.

In an examination of the need of certain minors to contract, one class of minor comes immediately to mind: the emancipated minor.\footnote{42} There is no distinction\footnote{43} in the law of contract between an emancipated minor and one who is not emancipated. Undeniably, the laws designed to protect infants in general completely hamstring the emancipated infant. To illustrate, the married minor who has need to make any major purchase finds that he cannot do so unless he pays cash,\footnote{44} and the rule binding

\footnote{40} Perhaps the majority of businessmen do not realize that even small cash sales can be disaffirmed in most states.

\footnote{41} “Restrictions” is a proper term, because the protection given infants by the law is a many edged sword: the infant who desires and needs a contract will have difficulty finding an adult who is willing to deal with him. The adult, of course, fears disaffirmance.

\footnote{42} Emancipation may be made by express agreement between child and parent, or by implication, as when the child marries. See generally, 2 WILLISTON, op. cit. supra note 1, § 225.

\footnote{43} A distinction of sorts is made in the “necessaries” area. The number of possible items which might be held “necessaries” is increased somewhat to include items essential to the fulfilling of the infant’s role as husband and father. Burns v. Smith, 29 Ind. 181, 64 N.E. 94 (1902); Taunton v. Plymouth, 15 Mass. 203 (1818).

\footnote{44} The fallacy of this is apparent when one observes that a minor may disaffirm even an executed contract. See cases cited note 3 supra. An informal survey by the author in Bloomington, Indiana, a small Midwestern college community, indicated that any charge account opened by a minor at the local stores must be guaranteed by the minor’s parent or guardian. The credit manager of a large national chain-store, however, said that if the applicant had good credit and a steady job that his age was immaterial to them. That is, they are more interested in stability than age. An exception to the merchants who would sell for cash was the automobile dealer. None contacted would sell to minors under any conditions, unless their parents signed agreements to guarantee the purchase price and save the dealer harmless from any liability he might incur as a result of the sale. This policy may be due both to the fear of disaffirmance and to an Indiana decision which held a vendor of an automobile liable for a tort committed by the vendee with the automobile: Smith v. Thomas, 126 Ind. App. 59, 130 N.E. 2d 85 (1955), in which the court said, “where a person turns over an automobile to be driven . . . on the public highways of this state to a person who is too young to obtain a drivers license with (sic) restrictions . . . he is liable for negligence in the entrusting the operation of the automobile to such minor for any damages for injuries
him quasi-contractually for necessaries does not always furnish a solution. Of course, he may obtain a surety or have a guardian appointed, or his father or other adult may make the purchase in the adult's name. These remedies are circuitous, troublesome, and often impractical. The doctrine of infants' incapacities has always obstructed the emancipated infant in his personal and business dealings. However, in this decade there are enough emancipated infants in the United States to justify the law's special recognition of their peculiar problems.

In the present century alone, the married infant has risen from relative obscurity to a numerically prominent position: almost one-half million males in this country aged eighteen, nineteen, and twenty are married. Of the twenty year-old males, almost one fourth of the total are married. Compare this to figures of only forty years ago, when a mere 189,000 males in the same three-year age group and only one-half the present percentage of the twenty year-olds were married. This large and growing group of minors have the same legal responsibilities and duties as adults towards their spouse and offspring, but are treated as any other minor by the law of contract. These married infants live like adults, often, free from parental restrictions; however, to the law of contract they are no different than any other infant.

It is common knowledge that our economy is increasingly based on

caused as a result of the negligence of such minor.” But cf., Opple v. Ray, 208 Ind. 450, 195 N.E. 81 (1935); Ingram’s Adm’r. v. Advance Motor Co., 283 Ky. 87, 140 S.W.2d 840 (1940); Rush v. Smitherman, 294 S.W.2d 873 (Tex. Civ. App. 1956).

45. While a surety provides a great deal of protection to the merchant, the device is not foolproof. Although the adult surety is not discharged from liability if the infant disaffirms the contract (Gnaggs v. Green, 48 Wis. 601, 4 N.W. 760 (1880)), if the minor both disaffirms and returns the consideration furnished him, the contract is at an end, and the surety is released from further liability. Evants v. Taylor, 18 N.M. 371, 137 P. 583 (1913).

46. Females are excluded from these figures for the following reasons: (1) Most states have made provision for validating any contracts made jointly by a minor wife and her adult husband. See, e.g., IND. ANN. STAT. §§ 56-203, 56-204 and 56-207. (2) Far more females in the age groups presented are married than males. Thus their inclusion would inflate the figures, and since the additional married females must be married to adult males, and the statutes above mentioned take care of their problems, the inflation of the figures would indicate a need even greater than it is. (3) In most instances, if the husband is given the capacity to contract it will be sufficient to solve the problems raised in this paper, therefore a truer picture of the need of the married minor may be presented by reference only to the statistics for males.


48. Ibid.

49. Ibid. At the beginning of this century, only 1% of the fifteen to nineteen year olds were married (the marital status of the 735,649 males aged twenty is not available). TWELFTH CENSUS OF THE UNITED STATES, vol. II, part II, tables XLIV and XLVIII (1900). It is interesting that in Indiana 27.4% of the twenty-year old males are married: considerably above the national figure. 1960 Census, op. cit. supra note 28, pt. 16, table 105.

50. See note 43 supra.
credit, yet the law denies nearly 500,000 citizens even the most prudent use of this device to obtain goods and services for themselves and their families. The inability of the emancipated minor, and particularly the married minor, to enter into contracts is the major problem posed by the application of ancient standards in the social and economic milieu of the 1960's. It would be desirable in solving this problem also to permit other classes of minors to contract if they had both the need and the maturity in fact to do so. It is necessary, also, that the law still provide protection to the minor from unfair dealings.

In sum, while many, perhaps most, infants need the ancient protection given them by the law, this protection seems rather an arbitrary restraint upon the large and growing class of emancipated infants who have a definite need to enter into contracts. In addition, the law's protection is doubtless unnecessary as regards some unemancipated infants, who may well have the maturity necessary to decide for themselves the fairness of contracts into which they wish to enter. Furthermore, to prevent possible future difficulties, the law of infants' contracts should relax its simple, arbitrary doctrines to conform to present business practices by allowing minors to enter into certain small transactions without a possibility of later disaffirmance.

**Possible Solutions**

Of course, the problem of the emancipated infant has not gone unrecognized; indeed, nine states have attempted by legislation to solve it by prescribing eighteen years as the age of majority for married persons. This solution has been attacked on the partially valid ground that marriage does not automatically vest maturity in a person. Marriage does not invest a person with wisdom or stability; it might even be argued that a hasty, youthful marriage indicates a lack of maturity. But neither is a person automatically invested with contractual acumen on his twenty-first birthday. A more precise criticism of lowering the age of majority for married persons is simply that it still bases full contractual capacity solely on an arbitrary point in time. The selection of any age is arbitrary in that it leaves to chance the individual minor's need to contract, his need

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51. See note 41 supra, and text accompanying note 42 supra.
54. There is evidence, however, that the ability to maintain a successful marriage is an indication of maturity. SAUL, op. cit. supra note 27, at 7 and 125.
of protection, and his background, training, experience, maturity, and education. Lowering the age for married persons might solve some of their contractual problems, but it does nothing to allow the vast majority of infants to contract if they have the need and competence. Consequently, it is submitted that a better solution (even to the problems of the married minor) can be found.

A suggestion as to the direction such a solution might take can be gleaned from statutes in California and New York which provide that either party to a contract for the employment of infants in the entertainment and professional athletic fields may submit the contract to a court for approval. If the contract is found to be fair to the infant, it is declared binding and may not be disaffirmed. While these statutes are severely limited in the classes of infants and the classes of contracts which come within their operation, they are useful as a guide for possible solutions to the broader problems this note has posed.

If broadened to include all infants' contracts, similar statutes could provide the ultimate in protection to the infant from unfair contracts, while at the same time protecting the adult from future disaffirmance by the infant. A way would thus be open to the infant who needed a contract to obtain it with judicial approval. There are, however, certain serious drawbacks in the extension of these statutes to all infants' contracts. For example, in many areas of the country, securing prior judicial approval of each contract into which the infant proposed to enter would involve a long delay. This delay in itself could render the solution impractical. Even worse, the necessity of obtaining separate judicial approval of each contract would be an expensive operation even if, as would certainly be the case, resort to this method were limited to major contracts. Add to these objections the fear of chaotic overcrowding of court calendars, and it is evident that few legislatures would pursue this course toward solution of the problems under discussion.

A similar approach has been taken by eight states, which answers in

55. See note 34 supra.
58. The California statute was first enacted in 1927, and was amended in 1941 and 1947, reaching its present form in 1963. See note 56 supra. The New York statute (note 57 supra) is slightly more detailed and provides that no contract of over three years duration may be approved. If the minor is unmarried, and under eighteen years of age, parental approval must be obtained. The statute also allows the court to revoke its approval of the contract if this is required in the best interests of the minor. The revocation is not, of course, retroactive.
part the objections to an extension of the California and New York statutes. Under these eight statutes, a minor or his parents may petition a court to remove the disabilities of the minor to contract with no restrictions on the class of minor or the subject matter of the contract, except that seven states set a minimum age at which the decree of removal of disabilities may be granted.

Tennessee's statute is the most flexible and the most consistent with the retention of a good measure of protection for the minor. It provides that the chancellor may remove the disabilities of any minor over the age of eighteen years upon petition of that minor, after a hearing in which the minor's parents are made defendants and at which any other relative or friend of the minor may appear to contest the removal of disabilities. The decree may remove disabilities generally or may remove them only to permit the making of a particular contract. The decree, in short, may impose any restrictions on removal as the chancellor "deems proper . . . in the best interests of the minor." This type of statute is flexible, provides security for the adult contracting with a minor who has taken advantage of its provisions, and gives the minor who needs it the ability to enter into binding contracts. While there would be some expense, delay, and crowding of court calendars, these disadvantages would occur only once for each minor, not once for each contract of each minor.

The main objection that can be raised against such a statute is that it does not furnish maximum protection for the minor; he could be duped by an adult an hour after the hearing. Investigation by the court prior to the issuance of a decree would minimize this possibility by increasing the probability that the minor had the necessary maturity to contract. This probability is only relative, however, and the objection cannot be completely refuted. Any solution to the problem raised by the present denial of capacity will entail some compromise. Since the law must consider many interests which are often conflicting, the solution arrived at must be the best possible after balancing the interests involved. The Tennessee statute generally appears to present, in theory, the best plan yet devised.

Apart from its theoretical usefulness, this type of statute seems to work. The Tennessee statute, for example, either is quite effective or is used infrequently, because there are no reported cases under it although it has been in effect since 1915. A similar statute in Texas has been

60. See note 34 supra.
61. See text accompanying note 10 supra.
62. Much the same can be said of the Mississippi, Arkansas, and Alabama statutes, the litigation under which has been mainly limited to jurisdictional questions. See e.g.
on the books since 1881. One case under this statute, *Dallas State Land Bank v. Dolan,* 64 deserves detailed exposition because of the insight it gives into the results possible under a poorly drafted statute of this type.

The case concerned an infant who took a one-quarter interest in certain land from his father’s intestate estate. After the passage of some time, his mother, who also had taken a fractional interest, remarried. When the infant was eighteen, he made application for a removal of his minority disabilities, in which application the step-father falsely swore that the infant was nineteen years old, the minimum age at which such a decree could be granted. The hearing on the application was held only two days after the application was filed, and the decree was granted on the same day as the hearing. Afterwards, the infant executed a deed of gift of his interest to his mother. The case under discussion arose when the infant attempted to claim his one-fourth interest against the Dallas Land Bank, which had acquired title to the land. The infant claimed that since he was under twenty-one years of age at the time of his deed to the mother, he could disaffirm that deed and recover the property. He attacked the decree removing his disabilities on the ground of want of jurisdiction, as such jurisdiction was conferred only when the petitioning infant was over nineteen. In denying the minor recovery of his claimed share, the Texas Supreme Court said the recital in the decree that the infant was nineteen years of age was conclusive of that fact and the decree was immune to collateral attack. The court stated that while the statute did not provide for investigation of the facts in the minor’s application, 65 authority for such investigation was implied and was assumed to have been made.

Regardless of the necessity of removal decrees being given protection in the interests of stability, there is evident in this case an inherent defect in the statutes which provide for judicial removal of disabilities: inadequate investigation by the court issuing the decree may result in the law being used as a tool for judicially-approved overreaching of the infant by an adult. While no statute can completely protect the infant or the

Hutchinson v. Till, 212 Ala. 64, 101 So. 676 (1924); Tays v. Johnson, 173 Ark. 223, 292 S.W. 122 (1927); Dubon v. Tolkes, 153 Miss. 91, 120 So. 437 (1929).

63. Note 59 supra.

64. 132 Tex. 198, 120 S.W.2d 798 (1938).

65. Tex. Civ. Stat. Ann., tit. 96, art. 5921 (1962) “Minors above the age of nineteen years, where it shall appear to their material advantage, may have their disabilities of minority removed. . . .” Art. 5922: “The petition for such removal shall state the grounds relied on, whether the parents of the minor are living or dead, and the name and residence of each living parent. Such petition shall be sworn to by the father or mother of said minor or by any other credible person cognizant of the facts, and shall be filed with the District Court of the county where the minor resides, and a hearing had on any day of any term of said court, or during a vacation of said court.”
court from fraud, the particular false information given in *Dolan* could surely have been discovered with a minimum of effort. At least the statute could provide for an investigation and also provide for a minimum time lapse between the application of the infant and the granting of the decree.

Although the *Dolan* case illustrates a defect in the judicial removal of disabilities statutes, one must weigh the possible abuse of the statutes against the advantages they offer. On balance, the lack of abuses, evident in the dearth of reported cases, leads to the conclusion that this type of statute, if carefully drafted and administered, has the potential of being an effective, workable, and useful tool in solving the problems presented by the blanket rule of disability now in effect in most states.

Another possible approach would be a statute establishing a presumption of the incapacity of infants, replacing the present rule of law that all persons below twenty-one years are incapable of contracting. For example, such a statute could provide that all persons under the age of sixteen years are incapable of entering into a valid contract; such persons could disaffirm any contract as they can under present law. However, persons having attained their sixteenth birthday would be prima facie presumed to lack capacity to enter into contracts, but the adult party to the contract could overcome this presumption by evidence of capacity in fact.

An explanation of the selection of an age limit of sixteen is appropriate. The compulsory education laws of many states fix sixteen years as the minimum age at which a minor may leave school. Thus, infants under this age are generally living with parents and attending high school: they have little pressing need to contract in their own name. It is also true that only an insignificant percentage below this age are married. Furthermore, even if there were a need for minors under sixteen to contract, they arguably are so immature that the need would not outweigh their lack of understanding, and therefore granting of even presumptive capacity would do them more harm than good. Therefore, while this note has argued elsewhere against the establishment of any age in connection with capacity, it is believed that no harm will be done or serious problems raised if the age of sixteen were set as an age below which no contract could be binding on the minor.

After his sixteenth birthday the minor would, under the proposed statute, be presumed incapable of contracting. This presumption could be rebutted by the other party to the contract by offering evidence that

66. See, *e.g.*, IND. ANN. STAT. § 28-505 (Burns 1964 Supp.).
67. Only 12,958 males sixteen years of age were married in 1960; this is only .9% of the total. 1960 CENSUS, *op. cit. supra* note 28, part 1, page 1-442.
68. See note 34 *supra* and accompanying text.
the minor was, in fact, capable. Such evidence could go to the possession by the minor of superior reasoning power or outstanding intelligence, that is, to personal qualities possessed by the minor. Evidence that the minor is married or engaging in business as an adult may also tend to show contractual capacity. The statute could list several states of fact, which, if proven to be present at the time of contracting, would conclusively rebut the presumption of incapacity—for example, marriage.

The proposed statute's weaknesses are apparent, the most serious being that it would probably solve nothing. The adult party to a contract with an infant would be in no better position than he is today except that he could submit the issue of the infant's capacity to a jury. The infant would likely have just as much difficulty finding an adult to contract with him as he now has, because no adult would want to invite litigation even if he had more than an even chance of winning. If the statute included a state of facts which would rebut the presumption of incapacity (marriage, for example), the minor would be deprived of any protection from an overreaching adult; the statute would in effect only be reducing the age of majority for persons who fell within the enumerated states of fact. The shortcomings of such inflexibility have already been discussed. Since the purpose of the changes under discussion is to permit the making of prudent contracts by those minors who need the capacity to contract or those who have the maturity necessary to exercise it intelligently, the proposed presumption rule would seem to fail in being able to accomplish its primary goal.

On the positive side, the presumption approach provides two major advantages over any solution discussed previously. First, there is no necessity of prior judicial approval of contracts. If the infant is in fact competent to contract, or if he falls within the list of classes which rebut the presumption of incapacity, he is bound on his contracts. This is an advantage to the minor since it obviates the necessary delay and expense involved in obtaining either removal of disabilities or approval of a specific contract. The statute could allow the court to invalidate any unfair contracts sought to be enforced by the adult, if the minor would other-

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69. See note 52 supra and accompanying text.
70. While the textual proposal suggested the presumption run in favor of incapacity, it would be possible to eliminate some of the objections discussed if the presumption were made to run in favor of the capacity of the minor. While this would reduce the risk involved for the adult, there would still be left the possibility of the minor overcoming the presumption at trial. More serious is the fact that letting the presumption run in favor of capacity would practically eliminate the protection which should be provided the minor against overreaching; since the point of any solution is to provide a method whereby exceptional minors can contract while still giving most minors protection of the law, the reversal of the presumption from that outlined in the text would be wholly unsatisfactory.
wise be bound under the statute. This would provide even more protection for the infant. Secondly, the proposed solution gives a flexibility unmatched by any discussed previously. If litigation ensued, the best interests of the minor would be examined in the light of the specific contract made; thus the court would not be working in a limbo of uncertainty as it tends to be under the judicial removal of disabilities statutes. At the same time, if the contract were fair, the statute would provide absolute removal of disabilities for those minors who need it most, while providing protection for other minors in the form of a rebuttable presumption against capacity. This same presumption would furnish a measure of protection for the adult who deals with an exceptionally mature minor who did not fall within the specified classes.

Any prediction as to the effectiveness of the presumption proposal is pure speculation, for no jurisdiction has adopted it. That the tort and criminal law rules of presumption apparently work does not permit a projection of the workability of similar rules in the law of contract. These areas of law cannot really be compared because in the former the rules deal with capacity to form intent or to commit a negligent act whereas in the latter they would deal with capacity to understand the ramifications of a commercial bargain, and because in the former, one is dealing with a contact between litigants that at least one of them did not seek, while in the latter with a voluntary contact, a "meeting of the minds." The best estimate that may be made as to the success of the presumption rules applied to contract is that of all the suggestions discussed in this note, they would be the most difficult to administer with certainty and the least likely to result in any appreciable change in the effects of the present law of infants' contracts. However, the presumption-statute suggestion is presented in the hope that further thinking will be stimulated in this area.

To summarize, of the solutions to the problems raised by the present law of infants' contracts, the New York and California statutes, providing for judicial approval of individual contracts, while efficient for the limited class of personal service contracts they cover (i.e., actors and athletes), do not solve problems in any other contract area. An extension of these approval statutes to cover all types of contracts would be expensive and burdensome for both the courts and for the infants requesting approval. The Tennessee-type statute providing for removal of infants' contracts

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71. That they apparently work does not mean that they are highly regarded. Indeed Prosser is very critical of these presumptions in the area of torts, saying they are arbitrary, and intimating that the ages involved are founded only on superstitious use of the magic number seven. PROSSER, LAW OF TORTS 158 (3d ed. 1964).

72. See note 5 supra.
disabilities, on the other hand, is satisfactory for the infant who desires to conclude a number of contracts, but may pose practical difficulties to the minor who only desires one contract which is not worth the expense involved in obtaining the removal decree. Also, any removal of disabilities prior to entering a contract could result in later overreaching of the minor unless provision were made in the statute to prevent this. The suggested solution of changing the present rule of law against capacity into a rebuttable presumption would overcome both the objection to the costs involved in the other solutions and the crowding of court calendars in the approval-type statute; however, it would be the least likely to result in any practical change in the problems of the infant who needs to contract. The attitudes of merchants and other adults would not likely be changed by the uncertainty of contract enforcement inherent in such a solution.