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## THE AGE OF MARITAL CAPACITY: RECONSIDERING CIVIL RECOGNITION OF ADOLESCENT MARRIAGE

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INTRODUCTION .....	1818
I. AGE AT FIRST MARRIAGE IN CONTEXT .....	1823
A. <i>Legal History of Marital Age Regulation</i> .....	1823
1. Canon Law, Common Law, and Early Statutory Law .....	1824
2. American Colonies and Early States .....	1828
3. Modern Regulation .....	1831
B. <i>Economic Influences on Age at First Marriage</i> .....	1833
C. <i>Evolution of the Meaning and Function of Marriage</i> .....	1836
1. Essential Functional Institution .....	1837
2. The Rise of Companionship .....	1838
3. Negotiated Spousal Roles .....	1839
II. EARLY MARRIAGE IN THE MODERN UNITED STATES .....	1841
A. <i>Demographics of Today's Early Marriers</i> .....	1841
B. <i>The Costs of Early Marriage</i> .....	1843
1. Family Instability and Divorce .....	1844
2. Lost Educational Attainment and Future Poverty .....	1846
3. Effects on Women's Mental and Physical Health .....	1847
4. Effects on Children's Developmental Outcomes .....	1848
III. REGULATORY LAG: THE INCOMPATIBILITY OF MODERN ADOLESCENCE AND MODERN MARRIAGE .....	1850
A. <i>Reconceptualizing Marital Capacity</i> .....	1850
1. Capacity to Consent .....	1851
2. Capacity to Sustain .....	1853
B. <i>The Age-Related Attainment of Marital Capacity</i> .....	1854
1. Cognitive Maturity in Adolescence and Capacity to Consent .....	1855
2. Psychosocial Development, the Prolonged Life Course to Adulthood, and Incapacity to Sustain Modern Marriage .....	1857
C. <i>Correcting Regulatory Lag: Raising the Age of       Presumptive Marital Capacity</i> .....	1860
1. Policy Considerations .....	1861
2. Constitutional Considerations .....	1861
CONCLUSION .....	1862

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*Age at marriage has for decades been the strongest and most unequivocal predictor of marital failure. The likelihood of divorce nears eighty percent for those who marry in mid-adolescence, then drops steadily. Delaying marriage until the mid-twenties reduces one's likelihood of divorce to thirty percent. Women who marry at age twenty-one or younger, moreover – and one in ten U.S. women do – experience worse mental and physical health, attain less education, and earn lower wages than those who marry later. Post-divorce, they and their children tend to endure even greater economic deprivation and instability than do never-married mothers, who will frequently have invested more in market work and education.*

*While the social cost of early marriage is significant, U.S. policy disregards the hundreds of thousands of young people currently married or divorced, as well as those who may be contemplating early marriage. A comprehensive analysis of early marriage and its regulation is overdue, and this Article undertakes that task.*

*The Article argues that a historic confluence of cultural and structural changes has simultaneously transformed the social function and meaning of modern marriage and prolonged the course of development to adulthood. It advances a new conception of “marital capacity” to supplant the current legal concept of consent, which is inadequate in the context of marriage. This new conception recognizes adolescents’ and emerging adults’ cognitive abilities to understand and voluntarily consent to marriage, but also accounts for their psychosocial immaturity and incomplete acquisition of other abilities required to sustain modern marriage.*

*The median age at first marriage is rising, reflecting gradual social adaptation to these cultural and structural changes. Legal adaptation, however, has lagged. Even though law is only one of the structural influences on family formation, legal change bringing the marital age in line with the modern social institution will go far to alleviate the strain on individuals and cost to society imposed by early marriage.*

#### INTRODUCTION

In 2010, the U.S. Senate unanimously voted to enact the International Protecting Girls by Preventing Child Marriage Act of 2010.<sup>1</sup> The bill aimed

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<sup>1</sup> International Protecting Girls by Preventing Child Marriage Act of 2010, S. 987, 111th Cong. (2010); 156 CONG. REC. S8353-55 (daily ed. Dec. 1, 2010). The bill never became law, failing to pass in the House of Representatives. 156 CONG. REC. H8551-52 (daily ed. Dec. 16, 2010). The House version of the bill had the initial support of 112 co-sponsors, but opposition arose following last-minute circulation of a memo that erroneously claimed its passage would authorize U.S.-funded abortions abroad. International Protecting Girls by Preventing Child Marriage Act of 2009, H.R. 2103, 111th Cong. (2009) (listing bill sponsor and original co-sponsors); Conor Williams, *Child Marriage Bill UPDATE*, WASH. POST (Dec. 17, 2010, 11:50 AM), [http://voices.washingtonpost.com/postpartisan/2010/12/child\\_marriage\\_bill\\_update.html](http://voices.washingtonpost.com/postpartisan/2010/12/child_marriage_bill_update.html). House members introduced another version of the bill, which was

“[t]o protect girls in developing countries through the prevention of child marriage,”<sup>2</sup> and Secretary of State Hillary Rodham Clinton joined its drafters in denouncing “*all* cases of child marriage as child abuse.”<sup>3</sup> The bill’s explicit target was marriage by individuals below a country’s legal minimum age, but its factual findings all alluded to marriage by girls under eighteen.<sup>4</sup>

The irony apparently lost on U.S. lawmakers who supported the bill is that child marriage is not limited to developing countries but is also a domestic practice; more than one in ten of all U.S. women surveyed between 2001 and 2002 had married before age eighteen, with an estimated 9.4 million having married at age sixteen or younger.<sup>5</sup> In 2010, more than 500,000 U.S. teens were married, divorced, separated, or widowed.<sup>6</sup>

What is surely the most familiar statistic of modern American family life – that nearly half of all marriages end in divorce<sup>7</sup> – obscures significant and consistent variations in marital stability depending on the age at which people first marry. For decades now, age at marriage has been the most consistent and

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referred to the House Committee on Foreign Affairs. International Prevention of Child Marriage Act of 2010, H.R. 6521, 111th Cong. (2010). As of this writing, no further action on the reintroduced bill has been reported.

<sup>2</sup> S. 987.

<sup>3</sup> *Id.* § 2 (emphasis added); see also S. REP. NO. 111-344, at 2 (2010).

<sup>4</sup> S. 987 §§ 2-3. The bill declared countries with high rates of marriages by those under eighteen to be “high-prevalence areas for child marriage” and required the State Department to provide status reports on the practice of child marriage, presumptively defining “child marriage” for reporting purposes to mean marriage by individuals under the age of eighteen if no legal minimum is stipulated by law. *Id.* § 2.

<sup>5</sup> Yann Le Strat, Caroline Dubertet & Bernard Le Foll, *Child Marriage in the United States and Its Association with Mental Health in Women*, 128 PEDIATRICS 524, 526 (2011) (drawing from a sample of over 24,000 American women and concluding that child marriage increases the risk of lifetime psychological disorders in women). Le Strat and his colleagues analyzed data drawn from the 2001 to 2002 National Epidemiologic Survey on Alcohol and Related Conditions (a population-based, national, representative-sample survey) to evaluate the impact of child marriage on the mental health of women in the general adult population. Using a sample of more than 24,575 women, the researchers found that women who married before age eighteen experienced higher rates of both lifetime and current psychiatric disorders than did women who married as adults. The study thus concluded that “[c]hild marriage increases the risk of lifetime and current psychiatric disorders in the United States.” See *id.* at 524, 528. For a more detailed discussion of the study’s findings, see *infra* notes 217-219 and accompanying text.

<sup>6</sup> U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, MARITAL STATUS OF PEOPLE 15 YEARS AND OVER, BY AGE, SEX, PERSONAL EARNINGS, RACE, AND HISPANIC ORIGIN, at Table A1 (2010) [hereinafter MARITAL STATUS OF PEOPLE 15 YEARS AND OVER], available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html>.

<sup>7</sup> ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 4 (2009) [hereinafter CHERLIN, THE MARRIAGE-GO-ROUND]; *National Marriage and Divorce Rate Trends*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 10, 2012), [http://www.cdc.gov/nchs/nvss/marriage\\_divorce\\_tables.htm](http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm).

unequivocal predictor of marital failure.<sup>8</sup> Of marriages entered at age twenty-five or later, fewer than thirty percent end in divorce.<sup>9</sup> Of marriages entered before age eighteen, on the other hand, nearly seventy percent end in divorce.<sup>10</sup> The earliest marriers, those adolescents who enter marriage in their mid-teens, experience marital failure rates closer to a sobering eighty percent.<sup>11</sup> Not until age twenty-two does marital stability improve significantly and do marriage dissolution rates begin to level off, although marriages entered at later ages are more stable still.<sup>12</sup>

The costs of child marriages (those entered before age eighteen) as well as early marriages more generally (those entered at age twenty-one or younger) extend beyond the likelihood of their dissolution. Early marriers are more likely than those who delay or avoid marriage to discontinue their formal educations prematurely, earn low wages, and live in poverty.<sup>13</sup> Women who marry early develop more mental health problems and experience worse physical health than those who marry later.<sup>14</sup> Following divorce, mothers (and their children) tend to suffer greater economic deprivation and instability than do their never-married counterparts.<sup>15</sup>

This Article sets out to address early marriage – not only to draw attention to its costs, but also to explore the social factors that influence age at marriage, to gain a better understanding of the underlying causes of its historic failure

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<sup>8</sup> THE NAT'L MARRIAGE PROJECT, *THE STATE OF OUR UNIONS 2001: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 19 (2001); Tim B. Heaton, *Factors Contributing to Increasing Marital Stability in the United States*, 23 J. FAM. ISSUES 392, 407 (2002); Jeffrey H. Larson & Thomas B. Holman, *Premarital Predictors of Marital Quality and Stability*, 43 FAM. REL. 228, 230 (1994).

<sup>9</sup> Heaton, *supra* note 8, at 407 fig.2.

<sup>10</sup> *Id.*; see also NAOMI SEILER, CTR. FOR LAW & SOC. POLICY, *IS TEEN MARRIAGE A SOLUTION?* 7 fig.5 (2002).

<sup>11</sup> Heaton, *supra* note 8, at 407 fig.2.

<sup>12</sup> See *infra* Part II.B.

<sup>13</sup> Gordon B. Dahl, *Early Teen Marriage and Future Poverty*, 47 DEMOGRAPHY 689, 691 (2010); see also Karl L. Alexander & Thomas W. Reilly, *Estimating the Effects of Marriage Timing on Educational Attainment: Some Procedural Issues and Substantive Clarifications*, 87 AM. J. SOC. 143, 143-44 (1981); Thomas Ewin Smith & Eugenia Hooker, *Sex Differences in Marriage and Parenthood as Factors Impeding Educational Attainment*, 59 SOC. INQUIRY 343, 343 (1989).

<sup>14</sup> Le Strat, Dubertet & Le Foll, *supra* note 5, at 527-28 (“[C]ontrolling for sociodemographic characteristics, child marriage was significantly associated with all lifetime mental disorders except pathological gambling and histrionic and dependent personality disorders.”).

<sup>15</sup> Daniel T. Lichter, Deborah Roempke Graefe & J. Brian Brown, *Is Marriage a Panacea? Union Formation Among Economically Disadvantaged Unwed Mothers*, 50 SOC. PROBS. 60, 75 (2003) (finding that for African American, Hispanic, and White women alike, “getting married and later divorcing more than doubles the likelihood of poverty”); see also SEILER, *supra* note 10, at 8.

rate, and through this better understanding, to propose legal reform informed by more than the simple empirical evidence of its failure.

The Article analyzes the legal and social history of marital age and its regulation, as well as research from social anthropology and the social and developmental sciences. It argues that a historic confluence of developments in cultural and structural factors that influence marriage has simultaneously transformed the social functions and meaning of modern marriage (increasing the relational capacities required to sustain it) and prolonged the course of development to adulthood (rendering adolescents and emerging adults – whose cognitive and psychological development we now know continues into the early twenties – even less likely to possess those requisite capacities).

To redress the inadequacy of our current legal framework, which conflates capacity to consent with capacity to perform, this Article advances a new conception of “marital capacity.” To give legally valid consent, a person must possess the cognitive abilities to understand the basic nature of the marital obligation and to voluntarily agree to marry. To sustain the modern marriage, a person must possess core aspects of psychosocial maturity and other abilities. The Article discusses research in the developmental sciences demonstrating that young people have attained the former cognitive abilities by mid-adolescence (ages fifteen or sixteen), but that they will not attain the latter psychosocial maturity and other abilities until late adolescence/emerging adulthood (the early twenties). It argues that “marital capacity” requires the attainment of both.

The median age at first marriage is rising, reflecting gradual social adaptation to these cultural and structural changes. Legal adaptation, however, has lagged. Law is only one of the structural influences on family formation. A legal structure that better corresponds to the nature and requirements of the modern social institution can, however, go far to alleviate the strain on individuals and cost to society imposed by early marriage. Law and legal institutions create and support civil marriage, using it as a tool to achieve socially desirable ends.<sup>16</sup> State-supported privileges and other benefits linked to marriage, while difficult to quantify, are vast. Economic benefits alone total billions of dollars annually in direct federal and state payments, tax benefits, and workplace-based benefits.<sup>17</sup> It is debatable whether marriage in general produces outcomes that justify the massive public investment in the institution.

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<sup>16</sup> June Carbone, *Morality, Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 SANTA CLARA L. REV. 267, 269-70 (1996); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 308-09 (2004).

<sup>17</sup> Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 141, 166-69 (2003). Bernstein notes that “[t]he United States government subsidizes marriage through transfer payments and other supports that are not means tested. These payments constitute a reward that taxpayers as a group bestow on a class of individuals based solely on these persons’ being . . . married.” *Id.* at 167-68. Social Security transfer payments and Medicare benefits are just two examples of subsidies that reward marriage. *Id.* at 167, 169.

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That early marriage does not is apparent. This Article thus urges reconsideration of state policies that give early marriages legal effect.

Part I provides historical, legal, and social context. It begins with the legal history of marital age regulation, which underscores the once-essential functions of marriage in society. It describes the current legal landscape, which has not strayed far from its common law roots. It then examines the significant and interrelated influence on marriage, and age at marriage, of changing economic and cultural conditions. It turns to social anthropology for an integrative account of the evolution of the social functions of marriage and the meaning of marriage itself. These social changes have rendered marriage less essential to individuals' economic survival and social acceptance, eliminated once-clearly defined spousal roles, making it necessary for individual couples to negotiate them, and increased individuals' expectations of the marital relationship itself.

Part II examines the demographics of modern early marriage and the largely overlooked yet overwhelming empirical data that reveals its social costs. Laws universally require parents to consent to the marriages of children younger than eighteen.<sup>18</sup> Parental consent, however, safeguards child marriages against negative outcomes insufficiently, if at all. The same can be said for delaying marriage until eighteen, the near-universal age of legal majority. Improvements in marital stability and outcomes appear only when couples delay marrying until their early twenties.

Part III argues that the law has failed to keep pace with these significant social developments. This Article argues that the social changes chronicled in the previous Parts demonstrate that the psychosocial capacities required to sustain a modern marriage have changed drastically over the last fifty years, while the cognitive capacity to understand and voluntarily consent to marry have remained essentially unchanged for centuries. It argues that the social and legal factors that once justified early marriage either no longer exist, or are sufficiently weak as to be outweighed by the state's obligation to safeguard the general welfare by – at a minimum – abandoning unreasonable policies demonstrably in derogation of it. The Article briefly describes relevant aspects of adolescent cognitive and psychological development, which continues well into late adolescence and beyond, and the age-related attainment of marital capacity.<sup>19</sup>

The Article concludes that states should return the presumptive age of consent to twenty-one, permit younger individuals to marry with judicial – not parental – consent, and withhold altogether legal recognition from marriages of adolescents younger than eighteen.

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<sup>18</sup> See *infra* notes 77-80 and accompanying text.

<sup>19</sup> See *infra* Parts II.B.1-2. See generally JEFFREY JENSEN ARNETT, EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES (2004).

## I. AGE AT FIRST MARRIAGE IN CONTEXT

This Part explores the influence of social contexts on age at first marriage. Scholars broadly characterize these contextual influences as structural (e.g., legal, economic, and institutional) or cultural (e.g., religious tradition and social norms).<sup>20</sup> Structural influences on family formation can be either economic (e.g., employment opportunities) or noneconomic (e.g., imbalances in sex ratios among marriageable individuals and legal requirements). Although each of these influences is conceptually distinct and affects empirical trends differently, they interrelate such that their effects on each other and on trends in family formation can sometimes be difficult to disentangle.<sup>21</sup>

The legal context, for example, both shapes and reflects cultural norms. The next Section examines the origins and evolution of the legal regulation of the marital age. It also discusses legal developments that have indirectly influenced trends in the age at first marriage. Yet the law has not been the only, nor likely the primary, contextual factor affecting the median age at which individuals first marry. Even during periods of no significant legal change, the median age at marriage has fluctuated. The subsequent Sections examine non-legal influences on age at first marriage, the most salient of which have included economic and cultural developments. Understanding both the legal and the non-legal developments that have shaped large-scale trends in the age at which individuals marry illuminates the meaning and function of marriage in society. As its meaning and function have changed, moreover, so too have the individual characteristics and abilities required to enter and sustain marriage.

A. *Legal History of Marital Age Regulation*

Legal regulation of marriage has increased over the course of centuries, reflecting marriage's growing importance as the primary social institution within the state.<sup>22</sup> Marriage regulations have long established the age at which individuals may marry, although as long as such rules have existed, ineligible couples wishing to marry have nonetheless managed to skirt them. Laws regulating the marital age, moreover, have frequently advanced social interests altogether unrelated to the legal maturity of would-be marriers.<sup>23</sup>

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<sup>20</sup> See, e.g., Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, 15 FUTURE CHILD. 33, 39-40 (2005) [hereinafter Cherlin, *Marriage in the Early Twenty-First Century*] ("Most analysts would agree that both economic and cultural forces have been driving the changes in American family life over the past half-century. Analysts disagree about the relative weight of the two, but . . . both have been important."); Jeremy Elliot Uecker, *Early Marriage in the United States: Why Some Marry Young, Why Many Don't, and What Difference It Makes 40* (May 2010) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with The University of Texas Libraries' Digital Repository).

<sup>21</sup> Cherlin, *Marriage in the Early Twenty-First Century*, *supra* note 20, at 40.

<sup>22</sup> See *infra* notes 24-28, 43-50 and accompanying text.

<sup>23</sup> See *infra* notes 43-50 and accompanying text.

The legal origins of U.S. marriage, and the societal interests they aimed to protect, indelibly shaped U.S. marriage itself and marital age law, which of course later adapted to the distinctive American milieu.<sup>24</sup> Essential aspects of the historical and legal elements of marital age regulation remain, however. It is to those aspects that this Article now turns.

### 1. Canon Law, Common Law, and Early Statutory Law

Family formation in the Early Modern period was informal, and family structure fluid.<sup>25</sup> Marriage existed, but it did so alongside polygamy, concubinage, easy divorce, and remarriage.<sup>26</sup> Its terms remained relatively variable and flexible into the Middle Ages, its sole essential characteristic consisting of a privately negotiated property exchange between two families, with financial protection for the wife in case of divorce or her spouse's death.<sup>27</sup> Couples with no property married through even simpler private agreements, which were enforced only informally by their communities.<sup>28</sup>

Marriage became a more clearly and rigidly defined institution when the Roman Catholic Church assumed regulation over it in the thirteenth century. Church canon law rendered marriages indissoluble, prohibited polygamy and incest, punished fornication and adultery, and declared nonmarital children illegitimate and ineligible to inherit property.<sup>29</sup> In the centuries that followed, however, the requirements for entering a valid marriage were neither widely understood by the public nor consistently implemented by the courts.<sup>30</sup> The original canon law recognized the validity of "spousal" or contract marriages requiring only the present agreement of the couple, and introduced the Roman age of consent – fourteen for males and twelve for females.<sup>31</sup> Together these doctrines diminished the importance of parental or guardian consent, which had been an essential aspect not only of medieval secular practice but also

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<sup>24</sup> Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31 (2004).

<sup>25</sup> LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800*, at 30-31 (1977) [hereinafter *STONE, FAMILY, SEX AND MARRIAGE*].

<sup>26</sup> *Id.* at 30.

<sup>27</sup> *Id.* at 30-31.

<sup>28</sup> *Id.* at 31.

<sup>29</sup> *Id.*; see also NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 5-6 (2000).

<sup>30</sup> STONE, *FAMILY, SEX AND MARRIAGE*, *supra* note 25, at 31-35. Additional formality requirements included publishing notices (known as "banns") of the upcoming marriage in the weeks preceding the ceremony or, in the alternative, purchasing a license to marry. *Id.* at 31.

<sup>31</sup> T.E. James, *The Age of Majority*, 4 *AM. J. LEGAL HIST.* 22, 31 (1960) ("Depending on the age of puberty, the age of fourteen for males fixed by Justinian was generally followed throughout Western Europe, subject of course to the requisite consents by guardians and parents.").



basic to the Roman law.<sup>32</sup> The weakening of family and parental control over marriage led the propertied classes to resist these canonical introductions.<sup>33</sup>

After the Protestant Reformation, marriage regulation came under civil (as opposed to purely religious) authority,<sup>34</sup> but the English Parliament enacted no statutory changes to then-existing marriage law.<sup>35</sup> The post-Reformation Church, on the other hand, sought greater formalization of couples' entry into marriage. It imposed new requirements that mandated public church ceremonies presided over by clergy and parental consent to the marriages of persons younger than twenty-one.<sup>36</sup> The ecclesiastical courts that retained jurisdiction over marriage litigation, however, continued to recognize the legal validity of informal contract marriages that failed to comply with the new formality requirements.<sup>37</sup>

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<sup>32</sup> LAWRENCE STONE, *ROAD TO DIVORCE: ENGLAND 1530-1987*, at 53-54 (1990) [hereinafter STONE, *ROAD TO DIVORCE*].

<sup>33</sup> *Id.* at 54.

<sup>34</sup> STONE, *FAMILY, SEX AND MARRIAGE*, *supra* note 25, at 32; *see also* John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, in *THE FAMILY, RELIGION, AND CULTURE* 42-44 (Don S. Browning & Ian S. Evison eds., 1997).

<sup>35</sup> STONE, *ROAD TO DIVORCE*, *supra* note 32, at 56.

<sup>36</sup> STONE, *FAMILY, SEX AND MARRIAGE*, *supra* note 25, at 32-33. Under Roman law, the age of majority had been fourteen for males, and twelve for females. James, *supra* note 31, at 23-25. In France, royal edicts quickly addressed the failure of the 1563 Council of Trent to require parental consent prior to young persons' marriages, requiring that any man under age thirty and any woman under age twenty-five obtain parental consent prior to marriage. STONE, *ROAD TO DIVORCE*, *supra* note 32, at 80.

<sup>37</sup> David Lemmings, *Marriage and the Law in the Eighteenth Century: Hardwicke's Marriage Act of 1753*, 39 *HIST. J.* 339, 344 (1996). A contract marriage merely required the oral agreement, expressed in the present tense, by a couple over the age of consent – fourteen for females, sixteen for males – in the presence of two witnesses. 3 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS* § 63 (Boston, Little, Brown & Co. 1852) (“[Mutual consent] is of the essence of marriage; it constitutes of itself, and without the addition of any ceremonies, a perfect marriage according to natural law; according to the canon law previous to the Council of Trent; [and] perhaps according to the law of England as it stood before the passage of the first marriage act . . . .” (footnotes omitted)) [hereinafter BISHOP 1852]; STONE, *FAMILY, SEX AND MARRIAGE*, *supra* note 25, at 32-33; STONE, *ROAD TO DIVORCE*, *supra* note 32, at 52; *see also* BISHOP 1852, *supra*, § 164 (quoting *Rose v. Clark*, 8 Paige Ch. 574 (N.Y. Ch. 1841)). While the state might statutorily require compliance with certain formalities, marriage was believed to exist in a state of nature and thus preceded the state. *Id.* § 68. Once a couple agreed to marry, theirs was a “*marriage in the sight of God*,” even “in the absence of all civil and religious institutions.” *Id.* “[T]he law of nature enables all persons in whom no natural impediment exists, to intermarry by mere words of consent, whenever they please.” 3 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS* § 144b (3d ed., rev. and enlarged, Boston, Little, Brown & Co. 1859).

By the seventeenth century, the public – especially the propertied elite – and clergy both increasingly regarded the church wedding, preceded by either a series of public announcements known as “banns” or by the procurement of a marriage license, as essential prerequisites to a valid marriage.<sup>38</sup> The civil common law courts, which decided property claims,<sup>39</sup> thus came to require a public church wedding before assigning full property and inheritance rights, treating contract marriages as valid but “irregular.”<sup>40</sup>

Many couples – most notably minors wishing to marry against their parents’ wishes – began paying corrupt clergymen to secretly preside over and register marriage ceremonies.<sup>41</sup> These “clandestine marriages,” despite noncompliance with formality requirements, were legally valid and binding (likely because they had been solemnized by church clergy).<sup>42</sup> Thus, unlike contract marriages that had not been solemnized, clandestine marriage conferred full property and inheritance rights.<sup>43</sup>

As growing numbers of young people secretly married against their parents’ wishes, parents of the propertied classes, anxious to control and pass on family property, sought to reassert control over their children’s marriages.<sup>44</sup> They ultimately turned to Parliament to put an end to legal recognition of clandestine and contract marriages,<sup>45</sup> and in 1753 Parliament passed the “Act for the better preventing of clandestine Marriages.”<sup>46</sup> Among the Act’s stated purposes was the “prevent[ion of] marriages among the children of the social elite which were not sanctioned by their parents and other relations.”<sup>47</sup>

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<sup>38</sup> STONE, ROAD TO DIVORCE, *supra* note 32, at 53. At the Council of Trent in 1563, the post-Reformation Catholic Church added the requirement of the public church ceremony presided over by a priest. *Id.* at 55.

<sup>39</sup> STONE, FAMILY, SEX AND MARRIAGE, *supra* note 25, at 32. After the Protestant Reformation, marriage regulation came under civil (as opposed to purely religious) authority, although marriage litigation remained within the jurisdiction of the ecclesiastical courts. *Id.* at 32; WITTE, *supra* note 34, at 42-44.

<sup>40</sup> STONE, FAMILY, SEX AND MARRIAGE, *supra* note 25, at 32-34.

<sup>41</sup> *Id.* at 33. Numerous churches and neighborhoods, such as the Fleet in London, became infamous for their clergymen’s willingness to flout official requirements and perform marriage ceremonies for pay. *Id.*

<sup>42</sup> STONE, ROAD TO DIVORCE, *supra* note 32, at 96.

<sup>43</sup> The oddity of recognizing as valid these otherwise-illegal marriages likely reflected the participation of clergy and the recording of the ceremonies in a registry. *Id.* at 98; Lemmings, *supra* note 37, at 345. The ecclesiastical courts instead focused enforcement and punishment efforts on clergy who performed the illegal ceremonies. STONE, FAMILY, SEX AND MARRIAGE, *supra* note 25, at 32-33; Lemmings, *supra* note 37, at 344-45.

<sup>44</sup> STONE, FAMILY, SEX AND MARRIAGE, *supra* note 25, at 35.

<sup>45</sup> *Id.*

<sup>46</sup> Lemmings, *supra* note 37, at 340.

<sup>47</sup> *Id.* at 347. The Act gave parents an effective veto over the marriages of minors, with fathers’ rights having priority over mothers’. *Id.* at 348-49. The Act preferred fathers or testamentary guardians to mothers. *Id.* And while minors could appeal the veto of a

Commonly known as Hardwicke's Marriage Act, the measure stated the basic elements of English marriage law for nearly a century after its passage.<sup>48</sup> Hardwicke's Marriage Act declared altogether void both contract marriages and marriages entered by those under twenty-one absent parental consent.<sup>49</sup> In doing so, it represented, according to one historian, "a uniquely authoritarian assertion of the economic and political interests of parents over their children" and an "unprecedented enforcement of parental and familial interest."<sup>50</sup>

Hardwicke's Marriage Act reinforced the centrality of marriage as the institution through which families controlled property and wealth. Inheritance laws allowed families to enter advantageous alliances through marriages that would produce heirs to whom family property would predictably devolve. Because Church law dictated that only legitimate children could inherit, ensuring the legal validity of marriage was critical. Hardwicke's Marriage Act, by rendering altogether void noncompliant marriages and thus potentially depriving a family of legitimate heirs, could be harsh in its effects.<sup>51</sup> The British Parliament, in the 1820s, sought to ameliorate these harsh effects and eventually repealed the Act in that same decade.<sup>52</sup> The laws of the American

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guardian or mother to the Court of Chancery, they could take no appeal from a paternal veto, though the father's "refusal be ever so whimsical or selfish." *Id.* at 349 (citing 15 THE PARLIAMENTARY HISTORY OF ENGLAND 59 (London, T.C. Hansard 1813)). Through this refusal to constrain fathers, the Act recognized the economic interests of the family and reinforced paternal prerogative to make decisions affecting those interests. Lemmings, *supra* note 37, at 345-50.

<sup>48</sup> STONE, ROAD TO DIVORCE, *supra* note 32, at 123.

<sup>49</sup> Lemmings, *supra* note 37, at 346-48. By either dissenting to the bann or refusing to consent to the issuance of a license, parents who objected to a match could prevent a minor child's marriage. *Id.* at 340.

<sup>50</sup> *Id.* at 341-42. Hardwicke's Marriage Act explicitly required parental consent to the issuance of marriage licenses – but not banns – to minors, a fact to which some commentators have drawn attention. See, e.g., Lynn D. Wardle, *Rethinking Marital Age Restrictions*, 22 J. FAM. L. 1, 7 (1984). Other commentators have observed that it was unnecessary for the Act to address banns, given that parental opposition to a bann sufficed to block the subsequent marriage (putting the community on notice of a potentially improper union in time to lodge objections was, in large part, the purpose of the publication requirement). Lemmings, *supra* note 37, at 342 n.11. In addition, the parental notification requirement preexisted Hardwicke's Marriage Act, reflecting concern with underage marriage, by more than a century.

<sup>51</sup> The nullification of a marriage, moreover, impeded the ability of the (now-unchaste) woman to remarry, threatening her with a life of economic vulnerability.

<sup>52</sup> Lemmings, *supra* note 37, at 360. In 1822, Parliament amended the Act by removing the provision nullifying the marriages of minors lacking parental consent. The amended law continued to require minors to swear that they had obtained parental consent and to provide written evidence of that consent before a license would issue. Although a noncompliant marriage would not be nullified under the new law, willful perjury or fraud carried severe penalties. *Id.* In 1823, Parliament formally repealed the remainder of the Act. *Id.* It imposed the additional penalty of forfeiture of material benefits from the marriage on

colonies and subsequent states never formally adopted Hardwicke's Marriage Act and instead tended to incorporate English common law rules that, by comparison, aimed to facilitate marital validity.<sup>53</sup>

## 2. American Colonies and Early States

The common law exported by Britain to its American colonies shaped early marriage laws, and the common law's influence endures today.<sup>54</sup> Among the characteristics of early common law doctrine that persist are the relative ease with which couples can enter legally valid marriages, the presumption in favor of a marriage's validity despite the presence of legal impediments or noncompliance with formalities, and the delegation of a gatekeeping function to parents whose children intend to marry despite having yet to attain the presumptive age of consent.<sup>55</sup>

American colonial law was an evolving blend of English common law, statutory rules adopted by colonial assemblies, and domestic common law.<sup>56</sup> The colonies all enacted marriage codes that mirrored English law, imposing similar formality requirements, preventing entry into "clandestine" or otherwise "unlawful" marriages, and extending to parents (especially fathers) the right to police their children's marriages.<sup>57</sup> Noncompliance, however, was

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minors marrying without the requisite parental consent, but removed nullification requirements for marriages entered absent full compliance with procedural requirements. Parliament did, however, require the nullification of marriages entered by couples who had willfully flouted the formal marriage requirements (i.e., the publication of banns or purchase of a license, followed by a church marriage). *Id.* With the exception of the removal of nullification requirements for marriages entered into without parental consent or with minor procedural defects (the main purpose of which, according to historian David Lemmings, was to make divorce less easily available based on these defects), English marriage law into the late 19th century diverged relatively little from the earlier provisions of Hardwicke's Marriage Act. *Id.*

<sup>53</sup> HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* §§ 2.1-4 (2d ed. 1988); Wardle, *supra* note 50, at 7.

<sup>54</sup> The states simply retained much of the preexisting common law after the nation's founding. BISHOP 1852, *supra* note 37, §§ 164, 167; COTT, *supra* note 29, at 5-6.

<sup>55</sup> See, e.g., CLARK, *supra* note 53, §§ 2.1-4. These early doctrines, however, responded to social and legal concerns of a historical context dramatically different from our own. Early parental consent requirements, for example, recognized parents' historical rights to the labor and earnings of their children. Perhaps as important, parental consent requirements – by empowering parents to veto improvident marriages – reflected the importance of forming family alliances through marital unions in order to expand family wealth, and the presumption of a marriage's validity reflected the importance of identifying legitimate heirs to preserve it. Although parental consent requirements endure, these justifications would hardly support their continued existence.

<sup>56</sup> MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 12 (1985).

<sup>57</sup> *Id.* at 67. Restating general legal principles as they existed in the nineteenth century, Joel Prentiss Bishop explained that a valid marriage required:

common.<sup>58</sup> Some couples may have resisted traditional religious and civic control over matrimony, others may have balked at the administrative costs of formalization, and still others in more sparsely settled regions may simply have lacked access to officials authorized to sanction and perform marriage ceremonies.<sup>59</sup> Led by the judiciary, American law responded to noncompliant marriages, not by strictly enforcing marriage regulations, but instead by extending legal recognition to all but those marriages marred by the most egregious impediments.<sup>60</sup> In American courts, “contract” or “irregular” marriage evolved into “common law marriage,” and judges relaxed evidentiary requirements for demonstrating its existence.<sup>61</sup>

Every state adopted the English age of legal majority – twenty-one – as the statutory age of presumptive marital consent, when individuals’ marriages no longer required parental involvement.<sup>62</sup> At the same time, however, most states failed to explicitly repudiate the English common law ages of presumptive marital consent – twelve for females and fourteen for males.<sup>63</sup> In the absence of statutory language explicitly expressing legislative intent to invalidate the common law, state courts consistently upheld the validity of marriages of individuals under twenty-one who met the common law age of presumptive consent – irrespective of state statutes that required parental consent to the marriages of those individuals.<sup>64</sup>

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1. An agreement; 2. according to the forms made necessary by the municipal law; 3. between a man and woman, both of whom are of sound mind; 4. of the requisite age; 5. capable of contracting marriage generally; 6. and with each other; 7. and capable of sexual intercourse. . . . The failure of any one of them makes the marriage invalid.

2 BISHOP 1852, *supra* note 37, § 43.

<sup>58</sup> GROSSBERG, *supra* note 56, at 68.

<sup>59</sup> *Id.* at 68-69.

<sup>60</sup> *Id.* at 69-70.

<sup>61</sup> *Id.* at 69-70, 79. Judges facilitated couples’ efforts to prove their marriages by “formally receiving into American common law the old rule that marriage could be presumed from the acknowledgements, cohabitation, and reputation of a couple.” *Id.* at 79. Statutorily imposed formality requirements thus became “directory, not mandatory.” *Id.* at 74.

<sup>62</sup> *Id.* at 106; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt a. (1981); Robert F. Drinan, *American Laws Regulating the Formation of the Marriage Contract*, 383 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 50, 55 (1969).

<sup>63</sup> GROSSBERG, *supra* note 56, at 106. English common law retained the Roman minimum age of marital consent. BISHOP 1852, *supra* note 37, § 192; *Id.* § 174 (stating that “[t]he consent of parents is not, at common law, essential to the validity of the marriages of minors” (footnotes omitted)). The validity of a marriage required only “suitable contracting parties, and a free consent, to render it valid.” GROSSBERG, *supra* note 56, at 103 (quoting FRANCIS HILLIARD, *THE ELEMENTS OF LAW* 15 (1835)).

<sup>64</sup> GROSSBERG, *supra* note 56, at 106-07, 143. The U.S. Supreme Court noted that the common law had long recognized the validity of informal marriages and held that, “a statute may take away a common law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed.” *Meister v. Moore*, 96 U.S. 76, 79

Beginning in the mid-nineteenth century, reformers began lobbying to raise the ages of both sexual and marital consent.<sup>65</sup> Galvanized by the spread of venereal disease and a growing prostitution trade that employed young girls, they launched a broad “social purity movement”<sup>66</sup> that advocated not only “premarital chastity and marital fidelity”<sup>67</sup> but more broadly sought to instill “a more generalized sense of sexual restraint and self-control and stigmatized all forms of non-marital sexuality.”<sup>68</sup> Purity reformers also suggested that the children of young couples were prone to ill health, and questioned the mental capacity of young marriers, reasoning that the age of “‘majority’ is the law’s simple devise for securing mental maturity in the graver affairs of life.”<sup>69</sup> Of the many decisions required of individuals, the reformers argued that marriage is “as serious a business as making a will or signing a deed.”<sup>70</sup>

Most states responded by raising statutory ages of sexual and marital consent, though only modestly.<sup>71</sup> The majority of states, whose ages of sexual consent were between ten and twelve, raised them to somewhere between thirteen and sixteen,<sup>72</sup> and many raised their ages of marital consent to sixteen for females and eighteen for males.<sup>73</sup> The judiciary, however, continued to consider nonage (that is, failure to reach the legally established minimum age) a less serious impediment to marriage than other impediments such as bigamy or incest, which rendered the resulting marriages altogether void.<sup>74</sup> Judges instead treated underage marriages as valid but voidable so long as either party remained underage, and as fully valid once both parties had reached the legal age of consent.<sup>75</sup>

By the end of the twentieth century, a majority of states had adopted statutes raising the age of marital consent and ending recognition of common law

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(1877).

<sup>65</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 141 (1985).

<sup>66</sup> J. Shoshanna Ehrlich, *You Can Steal Her Virginity but Not Her Doll: The Nineteenth Century Campaign to Raise the Legal Age of Sexual Consent*, 15 *CARDOZO J.L. & GENDER* 229, 233 (2009).

<sup>67</sup> *Id.* at 230 (quoting ALAN HUNT, *GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION* 77 (1999)).

<sup>68</sup> *Id.* at 229-31.

<sup>69</sup> GROSSBERG, *supra* note 56, at 141 (citing FRED S. HALL & ELIZABETH W. BROOKE, *AMERICAN MARRIAGE LAWS IN THEIR SOCIAL ASPECTS* 18 (1919)).

<sup>70</sup> *Id.*

<sup>71</sup> GROSSBERG, *supra* note 56, at 141-42; Ehrlich, *supra* note 66, at 235.

<sup>72</sup> Ehrlich, *supra* note 68, at 235.

<sup>73</sup> GROSSBERG, *supra* note 56, at 142.

<sup>74</sup> *Id.* at 142, 144-46; *see also* 1 BISHOP 1852, *supra* note 37, § 199. At common law, however, if either party was below the age of seven, the resulting marriage was altogether void. *Id.* § 194.

<sup>75</sup> BISHOP 1852, *supra* note 37, § 196; *see also, e.g.*, *Robinson v. Commonwealth*, 212 S.W.3d 100, 104 (Ky. 2006) (holding that a marriage of thirteen-year-old girl to an adult man was voidable, not void); BISHOP 1852, *supra* note 37, § 199.

marriages, which displaced the common law age of presumptive consent.<sup>76</sup> Both common law doctrines, however, have persisted in a minority of states into the twenty-first century.<sup>77</sup> In Colorado, for example, a court adopted the common law age of sexual consent – twelve for females and fourteen for males – as the presumptive age of marital consent for common law marriage.<sup>78</sup> Although state statute establishes eighteen as the presumptive age of consent for marriage, permitting individuals as young as sixteen to marry only with either parental or judicial consent, the court held that “[t]he common law of England . . . shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.”<sup>79</sup>

### 3. Modern Regulation

Age twenty-one continued to be the universal age of legal majority and statutory age of marital capacity until the mid-twentieth century.<sup>80</sup> Prompted by wartime needs, Congress lowered the draft age during World War II from twenty-one to eighteen.<sup>81</sup> Legal restrictions that denied rights to eighteen- to twenty-year-olds came under scrutiny soon thereafter.<sup>82</sup> By the early 1970s, approximately half of the states had lowered their ages of marital consent to eighteen.<sup>83</sup>

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<sup>76</sup> GROSSBERG, *supra* note 56, at 101-02.

<sup>77</sup> *Id.*

<sup>78</sup> *In re the Marriage of J.M.H.*, 143 P.3d 1116, 1118 (Colo. App. 2006) (quoting COLO. REV. STAT. § 2-4-211 (2012)) (holding that the common law age of consent for marriage was fourteen for males and twelve for females, and remanding the case to the trial court for an evidentiary hearing on the existence of a common law marriage between a fifteen-year-old girl and her putative common law adult spouse); *see also In re Pace*, 989 P.2d 297, 298 (Kan. Ct. App. 1999) (stating that “[t]he common-law ages of consent are 14 for a male and 12 for a female[, and that a] minor who has reached the age of consent does not need the consent of a parent to enter into a valid common-law marriage”). Kansas later raised the state minimum age of consent to eighteen by statute. KAN. STAT. ANN. § 23-101(b) (2007) (“The state of Kansas shall not recognize a common-law marriage contract if either party to the marriage contract is under 18 years of age.”).

<sup>79</sup> *J.M.H.*, 143 P.3d at 118 (quoting COLO. REV. STAT. § 2-4-211 (2012)).

<sup>80</sup> WENDELL W. CULTICE, *YOUTH’S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA* 72 (1992).

<sup>81</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. a, reporter’s note (1981) (“The impetus for the lowering of the age of majority probably came from the widespread draft of those under twenty-one and from the lowering of the voting age to eighteen.”).

<sup>82</sup> Advocates argued that if eighteen-year-olds were to bear the obligations of adulthood, in particular wartime military service, they ought also to receive all the legal benefits of adulthood. CULTICE, *supra* note 80, at 20-21 (quoting 88 CONG. REC. 8316 (1942) (statement of Sen. Arthur Vandenberg)).

<sup>83</sup> Note, *The Uniform Marriage and Divorce Act – Marital Age Provisions*, 57 MINN. L. REV. 179, 187 n.42 (1972) (citing statutory provisions of states that had, by 1972, lowered the marriage age). In 1974 the Twenty-Sixth Amendment made eighteen the national voting

The Uniform Marriage and Divorce Act (UMDA), promulgated by the Commissioners on Uniform State Laws in 1970, captured the national trend.<sup>84</sup> The UMDA's marital age provisions proposed: (1) setting eighteen as the presumptive age of marital consent; (2) permitting sixteen- and seventeen-year-olds to marry after obtaining either parental or judicial consent; and (3) permitting those younger than sixteen to marry after obtaining both parental *and* judicial consent.<sup>85</sup> Judicial consent required a finding (1) that the minor had the capacity to assume the responsibilities of marriage, and (2) that marriage was in the minor's best interest.<sup>86</sup> Failure to obtain the requisite parental and/or judicial consent rendered the resulting union voidable, but not automatically void.<sup>87</sup>

The presumptive age of marital consent is now eighteen in all states but two – Nebraska, where it is nineteen, and Mississippi, where it is seventeen for males and fifteen for females.<sup>88</sup> Every state permits adolescents younger than eighteen to marry with either parental or judicial consent, with most setting the minimum marital age at sixteen.<sup>89</sup> Nearly forty states permit minors younger than sixteen to marry with both parental and judicial consent, or in case of pregnancy or birth of a child.<sup>90</sup>

Other legal developments have influenced, albeit less directly, age at marriage. Historically, couples facing unintended nonmarital pregnancy commonly faced intense pressure to marry in order to avoid the social and legal stigma that attended nonmarital sex and illegitimate birth. In a series of cases beginning in the 1960s, however, the U.S. Supreme Court steadily eroded states' abilities to criminalize or otherwise burden private, consensual

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age. U.S. CONST. amend. XXVI.

<sup>84</sup> UNIF. MARRIAGE AND DIVORCE ACT (amended 1973).

<sup>85</sup> *Id.* § 203.

<sup>86</sup> *Id.* § 205.

<sup>87</sup> *Id.* § 208. Minors or their parents could bring suit to have the marriage declared invalid, but parents retained the right to do so only until the minor reached the age at which he or she could marry without the required consent. *Id.*

<sup>88</sup> MISS. CODE ANN. § 93-1-5 (2007); NEB. REV. STAT. § 42-102 (2008); *see also* *Roper v. Simmons*, 543 U.S. 587 app. D (2005); Pamela E. Beatse, Note, *Marital Rights for Teens: Judicial Intervention That Properly Balances Privacy and Protection*, 2009 UTAH L. REV. 625, 628 n.18 (gathering statutes regulating marriage). The Mississippi statute has not been challenged, although its differential treatment of males and females renders it constitutionally vulnerable under current equal protection doctrine. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>89</sup> *See generally* *Marriage Laws of the Fifty States, the District of Columbia and Puerto Rico*, LEGAL INFORMATION INSTITUTE, [http://www.law.cornell.edu/wex/table\\_marriage](http://www.law.cornell.edu/wex/table_marriage) (last visited Oct. 19, 2012) (gathering state statutes).

<sup>90</sup> *Id.* (showing the statutes of thirty-seven states contain provisions allowing minors younger than sixteen to marry with approval or in case of pregnancy or childbirth).



sexual conduct.<sup>91</sup> It also held unconstitutional the once-common impediments that stigmatized nonmarital children.<sup>92</sup>

Modern law thus punishes neither nonmarital sex<sup>93</sup> nor nonmarital birth, and premarital sex is nearly universal.<sup>94</sup> For adolescents, nonmarital procreation has become much more common than procreation within marriage: in 2007, the overwhelming majority of adolescents who gave birth were unmarried – only seven percent of fifteen-to-seventeen-year-olds and twelve percent of eighteen-to-nineteen-year-olds who gave birth did so within marriages.<sup>95</sup>

The dismantling of the negative legal consequences of nonmarital sex was an important structural change that evinced an increasingly tolerant sexual culture and growing respect for individual liberty. Along with other significant social changes, it rendered marriage less compulsory and contributed to the principal development in family formation over the past half-century – the erosion of marriage as the only acceptable locus for sex and childrearing.<sup>96</sup> The Sections that follow identify other significant contextual influences on family formation and age at marriage, examining first the role of changing economic opportunities then the cultural developments that have both fundamentally changed the function and very meaning of marriage in modern society.

#### B. *Economic Influences on Age at First Marriage*

For Western men, economic independence has long been considered a prerequisite to marriage.<sup>97</sup> Empirical data reveals a consistently inverse relationship between the availability of economic opportunity for men and age at first marriage.<sup>98</sup> Men have married at younger ages when greater economic

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<sup>91</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>92</sup> *See, e.g., Trimble v. Gordon*, 430 U.S. 762, 776 (1977) (invalidating state law requiring a nonmarital child, as a condition of inheriting by intestate succession from a non-custodial biological father, to demonstrate that his or her parents married after the child's birth).

<sup>93</sup> Explicit legal protection for same-sex intimate conduct is of more recent vintage. *See Lawrence*, 539 U.S. 558.

<sup>94</sup> Heaton, *supra* note 8, at 406.

<sup>95</sup> Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, NAT'L CTR. FOR HEALTH STATISTICS 1, 3 (2011), available at <http://www.cdc.gov/nchs/data/databriefs/db18.pdf>.

<sup>96</sup> CHERLIN, *THE MARRIAGE-GO-ROUND*, *supra* note 7, at 7.

<sup>97</sup> STONE, *ROAD TO DIVORCE*, *supra* note 32, at 54.

<sup>98</sup> Valerie Kincaide Oppenheimer, *A Theory of Marriage Timing*, 94 AM. J. SOC. 563 (1988). Oppenheimer's theory has since received significant empirical confirmation. *See, e.g.,* Kim L. Lloyd & Scott J. South, *Contextual Influences on Young Men's Transition to First Marriage*, 74 SOC. FORCES 1097, 1101-02 (1996); Valerie Kincaide Oppenheimer, Matthijs Kalmijn & Nelson Lim, *Men's Career Development and Marriage Timing During a Period of Rising Inequality*, 34 DEMOGRAPHY 311 (1997); Yu Xie et al., *Economic*

opportunities have been available to them; when economic opportunities have been scarce, men take longer to reach the economic security deemed necessary to sustain marriage and consequently marry later in life.<sup>99</sup>

Reliable, specific records documenting age at first marriage exist only as of the late nineteenth century. Before the nineteenth century, however, the ready availability of land in the expanding nation meant abundant economic opportunities for young men.<sup>100</sup> Evidence suggests that during this early period in the nation's history, men married relatively early, in their twenties.<sup>101</sup> Men also outnumbered women, and the sex-ratio imbalance helps explain the even younger ages at which colonial and early American women apparently married.<sup>102</sup> As the frontier disappeared and land became scarcer, though, it took young men more time to gain economic security, doing so at later ages.<sup>103</sup> They married later, too. The median age at first marriage climbed steadily, peaking around 1890 at ages twenty-six for men and twenty-two for women.<sup>104</sup>

The subsequent rise of industrialization at the turn of the twentieth century again created abundant employment opportunities for young men and offered a new path to economic security.<sup>105</sup> Manufacturing accelerated in the years during and after World War II, and economic opportunities continued to expand.<sup>106</sup> In the industrialized economy, advanced formal education and the years required to attain it were unnecessary to obtain well-paid work; only one out of three adults completed high school, and one out of sixteen graduated from college.<sup>107</sup> The median age of marriage again decreased, falling most drastically in the economically prosperous period between World War II and 1960, when it reached a low of twenty-two for men and twenty for women.<sup>108</sup>

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*Potential and Entry into Marriage and Cohabitation*, 40 DEMOGRAPHY 351 (2003).

<sup>99</sup> Catherine A. Fitch & Steven Ruggles, *Historical Trends in Marriage Formation: The United States 1950-1990*, in THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 59 (Linda J. Waite et al. eds., 2000).

<sup>100</sup> Michael R. Haines, *Long Term Marriage Patterns in the United States from Colonial Times to the Present*, 14-15 (Nat'l Bureau of Econ. Research, Working Paper No. h0080, 1996), available at <http://ssrn.com/abstract=190420>.

<sup>101</sup> *Id.*; Uecker, *supra* note 20, at 8.

<sup>102</sup> Haines, *supra* note 100, at 35-36.

<sup>103</sup> *Id.* at 36.

<sup>104</sup> Uecker, *supra* note 20, at 8; see also Christine Bachrach et al., *The Changing Shape of Ties That Bind*, in THE TIES THAT BIND, *supra* note 99, at 1; Haines, *supra* note 100, at 27.

<sup>105</sup> Haines, *supra* note 100, at 35-36.

<sup>106</sup> Fitch & Ruggles, *supra* note 99, at 65.

<sup>107</sup> U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PERCENT OF PEOPLE 25 YEARS AND OVER WHO HAVE COMPLETED HIGH SCHOOL OR COLLEGE, BY RACE, HISPANIC ORIGIN AND SEX: SELECTED YEARS 1940 TO 2002, at Table A-2 (2003), available at [www.census.gov/population/socdemo/education/tabA-2.pdf](http://www.census.gov/population/socdemo/education/tabA-2.pdf).

<sup>108</sup> U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ESTIMATED MEDIAN AGE AT FIRST MARRIAGE, BY SEX: 1890 TO THE PRESENT, at Table MS-2 (2012), available at <http://www.census.gov/population/socdemo/hh-fam/ms2.xls>; see also Fitch & Ruggles,

After 1960, technological advances led to increased automation in manufacturing, and the demand for blue-collar labor declined.<sup>109</sup> Domestic demand for labor declined further as the lower cost of labor abroad led to the exporting of manufacturing to other countries.<sup>110</sup> As blue-collar laborers no longer commanded premium wages, more women joined the paid workforce to help support their families.<sup>111</sup> These economically driven changes in the nature of family work helped mark the decline of the (short-lived) single-earner “family wage system” of the post-War years.<sup>112</sup>

Women’s participation in the paid labor force began making the economic opportunities available to them – in addition to those available to men – relevant factors in marital timing.<sup>113</sup> The potential for economic self-sufficiency made marriage less essential to women’s survival.<sup>114</sup> Women began to compete with men for jobs, since work in a service- and information-based economy was less likely to require physical strength than to require mental and social skills – aptitudes that did not differ by sex.<sup>115</sup>

Entry into the better-paying information-based professions for both men and women has required higher levels, and more years, of education and training.<sup>116</sup> More young people began staying in school into their early and mid-twenties to complete their educations, and more postponed marriage and parenthood.<sup>117</sup>

Influenced in part by these economic changes, the national median marital age again climbed, and it has done so steadily since 1960.<sup>118</sup> Americans are

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*supra* note 99, at 65.

<sup>109</sup> Cherlin, *Marriage in the Early Twenty-First Century*, *supra* note 20, at 39.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Oppenheimer, Kalmijn & Lim, *supra* note 98, at 311; Megan M. Sweeney, *Two Decades of Family Change: The Shifting Economic Foundations of Marriage*, 67 AM. SOC. REV. 132 (2002).

<sup>114</sup> See Sweeney, *supra* note 113, at 132.

<sup>115</sup> Dana Vannoy, *Social Differentiation, Contemporary Marriage, and Human Development*, 12 J. FAM. ISSUES 251, 261 (1991).

<sup>116</sup> Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 478 (2000). The U.S. Bureau of Labor Statistics predicts that the number of computer specialist occupations, specifically software engineers, systems analysts, and data analysts, will increase by forty-two percent between 2006 and 2016, and that nearly all of these will require some form of advanced degree. See Arlene Dohm & Lynn Shniper, *Employment Outlook: 2006-16: Occupational Employment Projections to 2016*, MONTHLY LAB. REV., Nov. 2007, at 86, 97 tbl.3, 98 (2007), available at <http://www.bls.gov/opub/mlr/2007/11/art5full.pdf>.

<sup>117</sup> Arnett, *supra* note 116, at 478.

<sup>118</sup> U.S. CENSUS BUREAU, *supra* note 108. The median marriage age reached twenty-two in 1980 – returning, after nearly a century, to its 1890 mark – and has continued upwards. *Id.*

marrying later in life now than they have at any time in the nation's history. Indeed by 2009 the median age at marriage reached a historic high of twenty-eight for men and twenty-six for women.<sup>119</sup>

The industrial and postindustrial economies wrought radical changes in both the nature of work and the composition of the workforce. Men's work first moved outside of the home, shop, or farm and into the factory. Women followed men into the paid workforce in subsequent decades, although generally driven less by the carrot of economic prosperity than by the stick of economic necessity.<sup>120</sup> Large-scale changes in the nature of individuals' work and participation in the national economic life have interrelated, moreover, with changes in their home lives – including ongoing evolutions in the nature of marriage relationships, family functioning more generally, and the role that marriage itself plays, and is expected to play, in individuals' lives.

### C. *Evolution of the Meaning and Function of Marriage*

Cultural factors – social norms, moral values, religious traditions, etc. – are among those that shape the contexts in which individuals develop preferences and make life decisions.<sup>121</sup> Social anthropologists have long agreed that marriage as we know it did not evolve as a “natural” or innate human preference.<sup>122</sup> To the contrary, marriage was a social invention that served to *counteract* behavior that characterized humans' evolutionary heritage – the sexual wandering of males whose reproductive strategy was to maximize their fertility and impregnate as many women as possible.<sup>123</sup> Because of women's limited reproductive capacity and their own dependency during the extended period from childbirth through a child's infancy and early childhood, men's commitment to marriage benefited women and children by requiring men to support and protect them.<sup>124</sup>

The precise nature and meaning of marriage, and the functions it performed in society, however, have evolved. The following Sections trace this evolution. They demonstrate that over time marriage has become less critical to individuals and to society, that individuals' expectations of their marital relationships are now higher and more difficult to meet, and that norms that once prevented individuals from exiting marriage are now weaker than they have been since the Church formalized the institution in the thirteenth century.

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<sup>119</sup> *Id.*

<sup>120</sup> Cherlin, *Marriage in the Early Twenty-First Century*, *supra* note 20, at 39–40.

<sup>121</sup> *Id.* at 40.

<sup>122</sup> Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 854 (2004) [hereinafter Cherlin, *Deinstitutionalization of Marriage*] (citing LIONEL TIGER & ROBIN FOX, *THE IMPERIAL ANIMAL* (1971)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

### 1. Essential Functional Institution

After the Church established the contours of legal marriage, the social and legal institution it defined remained firmly entrenched for centuries.<sup>125</sup> From the colonial era well into the nineteenth century and the period of rising industrialization, American marriages, once formed, generally conformed to that institutional structure.<sup>126</sup> Marriage was the social institution through which families protected and passed on family property, the support of girls and women was transferred from their families of origin to their husbands, and couples produced the offspring who would in turn inherit.<sup>127</sup> The institutionalized marriage provided clearly defined and fixed marital roles for husbands and wives.<sup>128</sup> The husband was the undisputed head of the household and its sole legal representative.<sup>129</sup> His primary marital role was to support and supervise his wife and children.<sup>130</sup> A wife's separate legal personhood disappeared upon marriage, becoming subsumed into that of her husband through the doctrine of coverture.<sup>131</sup> Her primary marital role was to provide her husband domestic services, maintain the home, and care for the family's children.<sup>132</sup>

Thus institutionalized, this marriage-type clearly defined spouses' respective roles and established the hierarchy within families.<sup>133</sup> Individuals entering marriage knew what was expected of them, and what they might reasonably expect. Divorce was all but unavailable, and even had it been a legally available option, women's economic dependence on their husbands and other social pressures would have rendered it unfeasible, at least for most women.

That institutional marriages endured until the death of one of the spouses provides us little or no information about the quality of couples' relationships.<sup>134</sup> Marital stability did not depend on relationship quality. Instead, powerful legal and cultural norms – the “forces of law, tradition, and religious belief,”<sup>135</sup> along with support provided by kinship networks, worked in concert to hold institutional marriages together.<sup>136</sup>

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<sup>125</sup> See *supra* note 29 and accompanying text; see also Hamilton, *supra* note 24, at 49.

<sup>126</sup> Cherlin, *Deinstitutionalization of Marriage*, *supra* note 122, at 851-52.

<sup>127</sup> COTT, *supra* note 29, at 6-7.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 7.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (describing the doctrine of coverture as a complete transfer of the wife's civic personhood to the husband).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Vannoy, *supra* note 115, at 258.

<sup>135</sup> Cherlin, *Marriage in the Early Twenty-First Century*, *supra* note 20, at 40.

<sup>136</sup> *Id.*; Vannoy, *supra* note 115, at 258.

## 2. The Rise of Companionship

The rising industrial economy that drew men into wage labor and paid them a wage sufficient to support a family produced the “single-earner, breadwinner-homemaker marriage,” which reached its heyday in the 1950s.<sup>137</sup> Income earning shifted from the joint family work of home and agricultural production to the husband’s laboring outside the home for wages. Spouses’ roles within marriages involved a clear and complementary division of labor.<sup>138</sup> Marital success entailed each spouse’s performance of his or her defined role, and spouses derived marital satisfaction from capably performing their respective roles (breadwinner, homemaker, parents) well.<sup>139</sup>

A clear division of labor was only one of the characteristics of this marriage-type. Perhaps because labor opportunities frequently required families to move to urban communities and thus weakened close-by kinship networks, or perhaps because the home was no longer the primary site of round-the-clock production and labor, husbands and wives increasingly encountered the need and opportunities for togetherness and emotional connection.<sup>140</sup> They began expecting to be each other’s companions to an extent not contemplated by institutional marriage.<sup>141</sup> The growing importance of emotional connection, friendship, and romantic love to perceived marital success led scholars to label this emerging form of marriage “companionate marriage.”<sup>142</sup>

While the emphasis on the companionate aspects of marriage continued to intensify over time, other characteristics and functions of institutional marriage endured relatively unchanged well into midcentury.<sup>143</sup> Marriage itself remained the only acceptable context for sex, procreation, and family life more generally.<sup>144</sup> Nonmarital cohabitation and childbearing continued to be

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<sup>137</sup> Cherlin, *Deinstitutionalization of Marriage*, *supra* note 122, at 851. This “traditional” marriage-type, however, was actually a short-lived mid-twentieth century aberration shaped by the confluence of a rising industrial economy and a post-War sociopolitical and economic context; at no other time in the nation’s history have families lived comfortably on the market wages of only one spouse, conceived and raised as many children to adulthood, or married as young. CHERLIN, *THE MARRIAGE-GO-ROUND*, *supra* note 7, at 6 (“We sometimes think of the 1950s as the era of the traditional family, perhaps because that’s as far back as our collective memory now reaches. But in truth it was the most unusual time for family life in the past century.”).

<sup>138</sup> Vannoy, *supra* note 115, at 252.

<sup>139</sup> *Id.*; see also Cherlin, *Marriage in the Early Twenty-First Century*, *supra* note 20, at 40.

<sup>140</sup> Vannoy, *supra* note 115, at 256.

<sup>141</sup> Cherlin, *Deinstitutionalization of Marriage*, *supra* note 122, at 851.

<sup>142</sup> Sociologist Ernest Burgess coined the term in the mid-twentieth century. See ERNEST W. BURGESS & HARVEY J. LOCKE, *THE FAMILY: FROM INSTITUTION TO COMPANIONSHIP* (1945).

<sup>143</sup> Cherlin, *Deinstitutionalization of Marriage*, *supra* note 122, at 851.

<sup>144</sup> *Id.* at 852. Historian Stephanie Coontz noted that even entering the 1960s, “nothing seemed more obvious . . . than the preeminence of marriage in people’s lives and the

relatively rare and were generally confined to socioeconomically disadvantaged members of society.<sup>145</sup>

By midcentury, however, a number of social developments converged, eventually contributing to marriage's becoming less essential to individuals' economic survival and social acceptability, and spousal roles becoming less clearly defined.<sup>146</sup> By the late twentieth century, these changes had helped to fundamentally transform the nature and meaning of the marital relationship itself.<sup>147</sup>

### 3. Negotiated Spousal Roles

The late 1950s and 1960s were a time of political and cultural ferment. Dissident political movements (for example, the antiwar movement, the New Left, and the black, gay, and women's rights movements) and the civil disobedience they utilized fed cultural disobedience, one of whose tenets was defiance of sexual norms.<sup>148</sup> The birth control pill became widely available, enabling couples to separate sex from pregnancy and marriage.<sup>149</sup> Nonmarital sex and cohabitation became more common and less stigmatized.<sup>150</sup>

The definition of, and expectations for, marriage continued to evolve into the latter decades of the twentieth century. The well-defined boundaries of spousal roles blurred.<sup>151</sup> In a growing number of marriages, both the husband and the wife worked outside the home.<sup>152</sup> Women continued to shoulder a disproportionate share of the housework and child care that had once been the near-exclusive purview of wives, but their husbands' contributions increased steadily.<sup>153</sup> Couples' roles within the dual-earner household became more negotiable, flexible, and egalitarian.<sup>154</sup>

Women's entry into and increasing equality within the workforce has meant that marriage no longer functions as the sole path to their economic survival. Dual-earner couples have had to renegotiate the once-clearly defined gender roles that made domestic duties solely the responsibility of wives. The norms

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permanence of the male breadwinner family." STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE* 243 (2005).

<sup>145</sup> COONTZ, *supra* note 144, at 263-64; Cherlin, *Deinstitutionalization of Marriage*, *supra* note 122, at 852.

<sup>146</sup> COONTZ, *supra* note 144, at 263-64. *But see infra* note 189 and accompanying text.

<sup>147</sup> COONTZ, *supra* note 144, at 263-64.

<sup>148</sup> *Id.* at 263; COTT, *supra* note 29, at 201.

<sup>149</sup> COTT, *supra* note 29, at 202.

<sup>150</sup> *Id.*

<sup>151</sup> Cherlin, *Deinstitutionalization of Marriage*, *supra* note 122, at 851-52.

<sup>152</sup> COTT, *supra* note 29, at 204.

<sup>153</sup> *Id.* at 205.

<sup>154</sup> *See* ARLIE HOCHSCHILD & ANN MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 11 (1989); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 16 (1999).

that defined for individuals their roles within marriage blurred, then all but disappeared, making the roles of husbands and wives flexible and negotiable. Marriage gradually lost its instrumental value as the sole socially acceptable path to intimate relationship, economic security, and family life.<sup>155</sup>

Research suggests that expectations of women and men for role sharing and equality within contemporary marriages heightened the level of tension within marriages.<sup>156</sup> Spouses' expectations of their marital relationships and their companions grew. The performance of pre-defined gendered spousal roles (provider, homemaker) no longer sufficed to define a satisfactory or good-enough marriage.<sup>157</sup> Spouses might be dutiful homemakers and providers, but they nonetheless began viewing the concept of marriage as fundamentally flawed if it no longer met their desire for love and intimacy. The measure of marital satisfaction thus shifted "from [the spousal] role to self" and self-fulfillment.<sup>158</sup>

The progressive destigmatizing and greater availability of divorce began to make exit from unhappy marriages easier.<sup>159</sup> It thus largely came to be that neither social nor economic necessity compelled individuals to enter or remain in marriages.<sup>160</sup> The companionate yet essentially role-based marriages of the early and mid-twentieth century thus evolved into what sociologists have termed the modern "individualized marriage."<sup>161</sup>

Marriage is no longer essential to social acceptance or economic survival and has thus lost some of its instrumental value.<sup>162</sup> It nonetheless remains central to the self-identities of many individuals, for whom it largely retains its symbolic and personal value.<sup>163</sup> If anything, these have increased as couples embrace individualized marriage as the cultural standard.<sup>164</sup>

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<sup>155</sup> See Vivian Hamilton, *Will Marriage Promotion Work?*, 11 J. GENDER RACE & JUST. 1, 8-9 (2007); Wendy D. Manning et al., *The Changing Institution of Marriage: Adolescents' Expectations to Cohabit and to Marry*, 69 J. MARRIAGE & FAM. 559, 560 (2007).

<sup>156</sup> Paul R. Amato & Alan Booth, *Changes in Gender Role Attitudes and Perceived Marital Quality*, 60 AM. SOC. REV. 58, 65 (1995).

<sup>157</sup> Cherlin, *Deinstitutionalization of Marriage*, *supra* note 122, at 853.

<sup>158</sup> FRANCESCA M. CANCIAN, *LOVE IN AMERICA: GENDER AND SELF-DEVELOPMENT* 11 (1987).

<sup>159</sup> Paul R. Amato, *Transformative Processes in Marriage: Some Thoughts from a Sociologist*, 69 J. MARRIAGE & FAM. 305, 309 (2007) (observing that spouses in modern marriages expect the marital relationship to fulfill their needs for personal growth and self-actualization, and that "[i]f the marital relationship no longer meets these needs, then spouses feel justified in jettisoning the relationship to seek out new partners who better meet these needs").

<sup>160</sup> COONTZ, *supra* note 144, at 247.

<sup>161</sup> Cherlin, *Deinstitutionalization of Marriage*, *supra* note 122, at 852.

<sup>162</sup> *Id.* at 854.

<sup>163</sup> *Id.* at 855-57.

<sup>164</sup> *Id.* at 855.



Modern individualized marriage nonetheless challenges marital stability and success by normalizing expectations for marital relationships that are difficult to meet and sustain over time. The following Part gathers empirical evidence of some of the significant effects these new challenges have on modern marriage, and also of the factors associated with couples' differing abilities to withstand these challenges.

## II. EARLY MARRIAGE IN THE MODERN UNITED STATES

Despite the historical shift toward delayed marriage, 2010 U.S. census data reported 520,000 married or previously married adolescents aged fifteen to nineteen,<sup>165</sup> and more than twenty-five percent of women and fifteen percent of men will marry before age twenty-three.<sup>166</sup> Early marriers contravene the strong national trends toward delayed marriage and increased cohabitation. This Part surveys research that identifies characteristics of earlier marriers and the nature and outcomes of their marriages. This research makes evident the high costs of early marriage, to both individuals and broader society.

### A. *Demographics of Today's Early Marriers*

A number of structural and cultural factors correlate with demographic differences in age at marriage.<sup>167</sup> Having parents with low socioeconomic status and educational attainment predicts early marriage; nearly thirty percent of women without a college-educated parent marry early, as opposed to sixteen percent of women with a college-educated parent.<sup>168</sup> The children of early marriers are also more likely to enter early marriages themselves.<sup>169</sup> Researchers have posited that these young people may be less likely to receive economic support from their parents, to attend college themselves, and to perceive attractive options outside of marriage.<sup>170</sup> Researchers have found the highest concentration of early marriers among the relatively poorer and more religious residents of Southern and nonmetropolitan regions of the country.<sup>171</sup>

In *Red Families v. Blue Families*, law and family scholars Naomi Cahn and June Carbone analyzed empirical research on families across the nation and found the highest rates of marriage overall and younger ages of entry into marriage in states whose citizens tend towards social conservatism and greater

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<sup>165</sup> U.S. CENSUS BUREAU, *supra* note 6.

<sup>166</sup> Uecker, *supra* note 20, at 38.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 30.

<sup>169</sup> *Id.* at 37.

<sup>170</sup> *Id.* at 18 (citing Diane K. McLaughlin et al., *Some Women Marry Young: Transitions to First Marriage in Metropolitan and Nonmetropolitan Areas*, 55 J. MARRIAGE & FAM. 827, 827-838 (1993)).

<sup>171</sup> McLaughlin et al., *supra* note 170, at 827. Thirty-seven percent of women living in the rural South marry before age twenty-three. *Id.*

religiosity.<sup>172</sup> Level of religious commitment as well as one's specific religious tradition both influence marriage timing.<sup>173</sup> Judeo-Christian religious denominations in general support marriage and marital childbearing, while discouraging nonmarital sexuality.<sup>174</sup> Denominations differ, however, in the emphasis they place on marriage and familism generally. Conservative Protestants and Latter-Day Saints (Mormons) embrace a theology that views marriage as sacred and essential to spiritual salvation.<sup>175</sup> Many evangelical denominations, in addition to adopting a strong pro-marriage orientation, actively discourage premarital sex and cohabitation.<sup>176</sup> These denominations also embrace traditional gender roles, encouraging women to invest time and labor in their families within the context of marriage, deemphasizing or discouraging their labor force participation, and advocating deference to male authority within the home.<sup>177</sup> When combined with strong pro-natalist orientations, these teachings incline young women towards marriage, childbearing, and domestic pursuits rather than education and workforce participation.<sup>178</sup>

More than forty-two percent of women raised as conservative Protestants married early, closely followed by Mormon women.<sup>179</sup> Along with committed adherents of other religious traditions, members of these religious groups marry earlier than mainline Protestants, Catholics, Jews, and the religiously unaffiliated.<sup>180</sup> Adolescents who attend school with higher proportions of

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<sup>172</sup> NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 2-3, 118-19 (2010) (discussing the opposition of conservative and religious parents to making the morning-after pill available to those younger than eighteen, and concluding that "[r]ed families would accordingly like to reinforce parental control over wayward teens and make it harder to escape the consequences of improvident conduct").

<sup>173</sup> Religious traditions place different types of emphasis on familism, which, according to some scholars, influences adherents' marriage patterns. Xiaohe Xu, Clark D. Hudspeth & John P. Bartkowski, *The Timing of First Marriage: Are There Religious Variations?*, 26 J. FAM. ISSUES 584 (2005) (exploring the correlation between religion and marriage timing and considering the role of familism – a cultural tendency to focus on the family more than the individual). Conservative Protestants and Mormons are the most likely to marry early. *Id.* at 588.

<sup>174</sup> *Id.* at 589; see also MARK D. REGNERUS, *FORBIDDEN FRUIT: SEX & RELIGION IN THE LIVES OF AMERICAN TEENAGERS* 21 (2007).

<sup>175</sup> MARK D. REGNERUS & JEREMY UECKER, *PREMARITAL SEX IN AMERICA* 176 (2011); Xu, Hudspeth & Bartkowski, *supra* note 173, at 590.

<sup>176</sup> Xu, Hudspeth & Bartkowski, *supra* note 173, at 590.

<sup>177</sup> *Id.* at 594.

<sup>178</sup> *Id.*

<sup>179</sup> Uecker, *supra* note 20, at 32.

<sup>180</sup> *Id.* at 609-10; Xu, Hudspeth & Bartkowski, *supra* note 173, at 607-08. Although Catholicism has historically included a strong pro-marriage orientation, recent studies suggest that the Church's influence over American Catholics' decisions about sex, marriage,

religiously conservative peers, irrespective of their individual religious characteristics, are also more likely to marry early.<sup>181</sup>

Early marriage also varies by race and sex.<sup>182</sup> White and Latina women are the most likely to marry early, and nearly thirty percent marry before age twenty-three.<sup>183</sup> Among men, Latinos marry early at the highest rates, with nearly twenty-five percent married before twenty-three, followed by White men at sixteen percent.<sup>184</sup> African American women and men both were the least likely to marry early (almost certainly due to the lower marriage rates overall among African Americans), with eleven percent of women and nine percent of men marrying before twenty-three.<sup>185</sup>

#### B. *The Costs of Early Marriage*

Married individuals generally have greater financial, social, and psychological resources than the unmarried.<sup>186</sup> They experience lower rates of chronic illness and physical limitation, and enjoy greater longevity.<sup>187</sup> Husbands tend to derive greater overall health benefits from marriage than do their wives, and at least some measure of the benefits that women derive stems from structural gender inequities.<sup>188</sup> In other words, the health of married women “improves because they are married to health insurance: their lower-paying jobs, and their inferior access to employment-based medical insurance, keep them away from the health care resources given more generously to working men.”<sup>189</sup> Researchers have found some evidence of a selection effect,

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and procreation has waned. *Id.* at 590 (citing studies).

<sup>181</sup> Uecker, *supra* note 20, at 81 tbl.3.4, 82.

<sup>182</sup> *Id.* at 32.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Matthew E. Dupre & Sarah O. Meadows, *Disaggregating the Effects of Marital Trajectories on Health*, 28 J. FAM. ISSUES 623, 625 (2007); Mary Rogers Gillmore et al., *Marriage Following Adolescent Parenthood: Relationship to Adult Well-Being*, 70 J. MARRIAGE & FAM. 1136, 1136 (2008) (gathering studies).

<sup>187</sup> LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 47-52 (2000); Terrance J. Wade & David J. Pevalin, *Marital Transitions and Mental Health*, 45 J. HEALTH & SOC. BEHAV. 155 (2004); Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483 (1995).

<sup>188</sup> Bernstein, *supra* note 17, at 178-80; Kristi Williams, *Has the Future of Marriage Arrived? A Contemporary Examination of Gender, Marriage, and Psychological Well-Being*, 44 J. HEALTH & SOC. BEHAV. 470, 471 (2003); Kristi Williams & Debra Umberson, *Marital Status, Marital Transitions, and Health: A Gendered Life Course Perspective*, 45 J. HEALTH & SOC. BEHAV. 81, 83 (2004). See generally Adrienne Frech & Kristi Williams, *Depression and the Psychological Benefits of Entering Marriage*, 48 J. HEALTH & SOC. BEHAV. 149, 150 (2007).

<sup>189</sup> Bernstein, *supra* note 17, at 179-80; see also Janet Wilmoth & Gregor Koso, *Does Marital History Matter? Marital Status and Wealth Outcomes Among Preretirement Adults*,

suggesting that marriage alone cannot account for the greater well-being of married individuals; instead, individuals with greater well-being before marriage are more likely to attract marriage partners and sustain marriages.<sup>190</sup>

A large and growing body of research identifies social costs associated with early marriage,<sup>191</sup> while there is little evidence of offsetting benefits.<sup>192</sup> For individuals to benefit from marriage, moreover, their marriages must remain intact. Early marriages, however, are unlikely to do so.<sup>193</sup> The following Sections examine the costs of early marriages.

### 1. Family Instability and Divorce

For decades, age at marriage has been the most consistent and unequivocal predictor of marital failure.<sup>194</sup> In fact, “age at marriage is one of the strongest

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64 J. MARRIAGE & FAM. 254, 257 (2002).

<sup>190</sup> See, e.g., Arne Mastekaasa, *Marriage and Psychological Well-Being: Some Evidence on Selection into Marriage*, 54 J. MARRIAGE & FAM. 901 (1992); Alois Stutzer & Bruno S. Frey, *Does Marriage Make People Happy, or Do Happy People Get Married?*, 35 J. SOCIO-ECON. 326 (2006) (finding that part of the association between marriage and mental health is due to selection, as those with better mental health are also more likely to marry). *But cf.* Kathleen A. Lamb, Gary R. Lee, & Alfred DeMaris, *Union Formation and Depression: Selection and Relationship Effects*, 65 J. MARRIAGE & FAM. 953 (2003) (finding no evidence of a selection effect with respect to depression, education, employment, income, or physical disability).

<sup>191</sup> See *infra* Parts II.B.1-4. Research to date generally supports the conclusion that marrying “early can lead to added stress and disadvantage, and ultimately poor health, because important socioeconomic resources may be forfeited (e.g., education).” Dupre & Meadows, *supra* note 186, at 626.

<sup>192</sup> See, e.g., SEILER, *supra* note 10, at 8 (stating, in an article published in 2002, that an analysis of the economic effects of marriage focusing “exclusively on teens is not available”). One recent longitudinal study compared pregnant seventeen-year-olds who married at any point within the sixteen years following their pregnancies (most of those who married, however, did not marry the fathers of their babies – fewer than fourteen percent ever did) with others who never married, and the average age of those who married was twenty-three. Gillmore et al., *supra* note 186, at 1140-42. The study found that marriage conferred small but statistically significant benefits with respect to economic status and lower marijuana and polydrug use. *Id.* Marriage did not, however, improve the economic status of the very poor, nor did it affect psychological well-being, high school completion, or the use of other drugs or alcohol. *Id.*

<sup>193</sup> See *infra* Part II.B.1.

<sup>194</sup> CAHN & CARBONE, *supra* note 172, at 55; THE NAT’L MARRIAGE PROJECT, *supra* note 8, at 19; Allan Booth & John N. Edwards, *Age at Marriage and Marital Instability*, 47 J. MARRIAGE & FAM. 67, 68, 71 (1985); Heaton, *supra* note 8, at 407; Larson & Holman, *supra* note 8, at 230. Historian Lawrence Stone noted that cultural trends throughout the Western world contributed to the rise of twentieth-century divorce rates. He observed that “[a] significant decline in the age of marriage was also a factor in the 1960s, since teenage marriages were almost twice as likely to break up as those contracted at a later age.” STONE, ROAD TO DIVORCE, *supra* note 32, at 403.

and most consistent predictors of marital stability ever found by social science research.”<sup>195</sup> Marriages in general have mediocre chances of enduring – altogether, about half of all marriages will end in divorce.<sup>196</sup> Early marriages, however, are significantly more likely to fail than are marriages entered later. Of marriages entered at age twenty-five or later, fewer than thirty percent end in divorce.<sup>197</sup> Of marriages entered before age eighteen, on the other hand, nearly seventy percent end in divorce.<sup>198</sup> The earliest marriers, those adolescents who enter marriage in their mid-teens, experience marital failure rates closer to a sobering eighty percent.<sup>199</sup> Not until age twenty-two does marital stability improve significantly and do marriage dissolution rates begin to level off, although marriages entered at later ages are more stable still.<sup>200</sup> Delaying marriage by even a single year significantly reduces the odds of dissolution.

A closer examination of the divorce rate over the last several decades reveals the significance of age at marriage on marital stability: The divorce rate increased through the 1970s until 1980, leveled off for a couple of years, and has since declined modestly.<sup>201</sup> Over the same period, the median age at marriage steadily increased.<sup>202</sup> If it had not, the divorce rate would have increased rather than decreased.<sup>203</sup> In other words, “[a]ll of the decline in dissolution can be accounted for by the rising age at marriage.”<sup>204</sup>

If divorce left family members more or less in the same position they would have been in had the couple never married, the high dissolution rate of early marriage might cause less consternation. Mental health studies have shown, however, that the negative psychological effects of divorce are greater than the

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<sup>195</sup> THE NAT’L MARRIAGE PROJECT, *supra* note 8, at 19; Warren Clark & Susan Crompton, *Till Death Do Us Part? The Risk of First and Second Marriage Dissolution*, 11 CAN. SOC. TRENDS 24, 25 (2006).

<sup>196</sup> *National Marriage and Divorce Rate Trends*, *supra* note 7; see also CHERLIN, THE MARRIAGE-GO-ROUND, *supra* note 7, at 2.

<sup>197</sup> Heaton, *supra* note 8, at 407.

<sup>198</sup> SEILER, *supra* note 10, at 7.

<sup>199</sup> *Id.*; Heaton, *supra* note 8, at 407.

<sup>200</sup> Heaton, *supra* note 8, at 407. While age at marriage correlates with marital instability for both White and African American women, there is evidence that the correlation is stronger for White women. For White women, marrying during adolescence results in a fifty-five percent higher risk of marital disruption than does marrying between the ages of twenty-three and twenty-nine; for African American women, the risk of disruption is forty percent higher than marrying between twenty-three and twenty-nine. Megan M. Sweeney & Julie A. Phillips, *Understanding Racial Differences in Marital Disruption: Recent Trends and Explanations*, 66 J. MARRIAGE & FAM. 639, 644-45 (2004).

<sup>201</sup> Heaton, *supra* note 8, at 398.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 401.

<sup>204</sup> *Id.*

positive effects of entering marriage.<sup>205</sup> For unwed mothers who marry then divorce, moreover, the risk of poverty is higher than it is for their counterparts who never marry.<sup>206</sup>

## 2. Lost Educational Attainment and Future Poverty

Teen marriage and lower educational attainment correlate. Women who marry before age nineteen are fifty percent more likely to drop out of high school than are their unmarried counterparts, and four times less likely to complete college.<sup>207</sup> And the correlation between educational attainment and income is so robust and unambiguous that it hardly bears repeating.<sup>208</sup>

Teen mothers who married between conception and childbirth were less likely to ever return to school than teen mothers who did not marry.<sup>209</sup> Teen mothers who marry are more likely to have a rapid second birth than are teen mothers who do not marry; they are also likely to have more children overall.<sup>210</sup> Unsurprisingly, both closely-spaced births and having two or more children are associated with lower educational attainment.<sup>211</sup>

Higher educational attainment, moreover, seems to have a protective effect against marital instability, and that protective effect has grown significantly in recent decades. Among whites, having at least sixteen years of education (compared to having less than twelve years) reduced the odds of marital disruption by thirty-nine percent between 1990 and 1994, compared with an eight percent reduction between 1970 and 1979.<sup>212</sup> The protective effect of higher education is even greater for African Americans, for whom having sixteen or more years of schooling was associated with a seventy-five percent reduction in the odds of disruption between 1990 and 1994, versus nineteen percent between 1970 and 1979.<sup>213</sup>

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<sup>205</sup> Williams & Umberson, *supra* note 188, at 93-94; Zheng Wu & Randy Hart, *The Effects of Nonmarital Union Transition on Health*, 64 J. MARRIAGE & FAM. 420 (2002).

<sup>206</sup> SEILER, *supra* note 10, at 8.

<sup>207</sup> Dahl, *supra* note 13, at 691; Daniel Klepinger et al., *How Does Adolescent Fertility Affect the Human Capital and Wages of Young Women*, 34 J. HUM. RESOURCES 421, 443 (1999). See generally David C. Ribar, *Teenage Fertility and High School Completion*, 76 REV. ECON. & STAT. 413 (1994) (examining the impact of teen childbearing on high school completion rates).

<sup>208</sup> See, e.g., Lichter, Graefe & Brown, *supra* note 15, at 73.

<sup>209</sup> SEILER, *supra* note 10, at 8-9 (citing Steven D. McLaughlin et al., *The Effects of the Sequencing of Marriage and First Birth During Adolescence*, 18 FAM. PLAN. PERSP. 12, 14 tbls.1 & 2 (1986)).

<sup>210</sup> *Id.* at 8; Deborah Kalmuss & Pearla Brickner Namerow, *Subsequent Childbearing Among Teenage Mothers: The Determinants of a Closely Spaced Second Birth*, 26 FAM. PLAN. PERSP. 149, 151 (1994).

<sup>211</sup> Dianne Scott-Jones, *Educational Levels of Adolescent Childbearers at First and Second Births*, 99 AM. J. EDUC. 461, 468 tbl.2 (1991).

<sup>212</sup> Sweeney & Phillips, *supra* note 200, at 645.

<sup>213</sup> *Id.*

Early marriage also correlates with future poverty. Researchers have only recently begun to study causality in the context of teen marriage. Economist Gordon Dahl studied more than 140,000 early adolescent marriages (those involving women who were younger than sixteen when they married), finding that early marriages have had a strong negative effect on future poverty, and that this effect is not due to self-selection.<sup>214</sup> Women who married young were significantly – thirty-one percentage points – more likely to live in poverty later in life than were women who delayed marriage.<sup>215</sup> The negative effect of early marriage is stronger even than the sizable negative effect of failing to complete high school; women who dropped out of school were eleven percentage points more likely to be poor when older.<sup>216</sup>

### 3. Effects on Women's Mental and Physical Health

In 2011, researchers published the results of the first national study of the effect of child marriage (before age eighteen) on adult mental health.<sup>217</sup> The study found U.S. child marriages linked to a range of psychiatric disorders – indeed, “child marriage was significantly associated with all lifetime mental disorders except pathological gambling and histrionic and dependent personality disorders.”<sup>218</sup> The most prevalent disorders were major depressive disorder, nicotine dependence, and specific phobias, but the researchers found the strongest association with antisocial personality disorder – the risk for women who married as children was nearly three times as high as that of adult marriers.<sup>219</sup>

In another analysis of the association between relationship status and mental health of young adults, the group that reported the highest depressive symptoms comprised those who married at age eighteen or younger.<sup>220</sup> The age group with the lowest levels of depressive symptoms comprised those who first married at age twenty-two or older.<sup>221</sup>

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<sup>214</sup> Dahl, *supra* note 13, at 714.

<sup>215</sup> *Id.* at 691, 705-06.

<sup>216</sup> *Id.* at 705-06.

<sup>217</sup> Le Strat, Dubertet & Le Foll, *supra* note 5.

<sup>218</sup> *Id.* at 528.

<sup>219</sup> *Id.* at 527. Other researchers have found maternal depression to be greater for women with younger age at first birth, falling to its lowest levels for women who first give birth around age thirty and correlating with later age of first marriage, higher educational attainment, and greater job security. John Mirowsky & Catherine E. Ross, *Depression, Parenthood, and Age at First Birth*, 54 SOC. SCI. & MED. 1281 (2002).

<sup>220</sup> Uecker, *supra* note 20, at 170-71, 170 tbl.5.2.

<sup>221</sup> *Id.* at 169-71. Those who were engaged to be married reported levels of depressive symptoms comparable to those who first married at age twenty-two or older. *Id.* More young adults who have ever been married, however, report that they are very satisfied with their lives than do those who have never been married. Nearly thirty-six percent of young adults in a dating relationship but never married report high overall life satisfaction, compared with nearly forty-eight percent of those who have ever been married. Levels of

Researchers have also found adolescent marriage correlated with worsened physical health for women.<sup>222</sup> Women who married at age eighteen or younger had a twenty-three percent greater risk of disease onset, including heart attack, diabetes, cancer, and stroke.<sup>223</sup> The study's authors found the negative impact of early marriage on women's health unsurprising, "given that these females may forfeit important health resources and often face a greater likelihood of divorce."<sup>224</sup> The study found no evidence that early marriage worsened the physical health of men who married early.<sup>225</sup>

Research uncovered no studies comparing the rates or types of intimate violence experienced by young married and unmarried women. The U.S. Department of Justice has reported, however, that women aged sixteen to twenty-four experience the highest rates of violence at the hands of their intimate partners, including assaults, rape, robbery, and murder.<sup>226</sup> This data raises concerns that when women in this age group marry, it becomes more difficult for them to exit violent relationships.

#### 4. Effects on Children's Developmental Outcomes

Numerous studies have compared the developmental outcomes of children born to young mothers and those born to adult mothers.<sup>227</sup> Nearly half of all

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life satisfaction among married young adults vary significantly by age of marriage, however: of those first married at eighteen or younger, nearly forty-one percent report high life satisfaction, compared to more than fifty-five percent of those first married at age twenty-two or older. *Id.*

<sup>222</sup> Dupre & Meadows, *supra* note 186.

<sup>223</sup> *Id.* at 636.

<sup>224</sup> *Id.* Dupre and Meadows also posited that females marrying early may be more likely to have psychological disorders that predispose them to illness. *Id.* The Le Strat, Dubertet & Le Foll study sought to more precisely isolate the effect of child marriage on the development of mental disorders by including in their analyses only those psychiatric disorders with an age at onset later than the age at first marriage. Le Strat, Dubertet & Le Foll, *supra* note 5, at 527.

<sup>225</sup> Dupre & Meadows, *supra* note 186, at 644.

<sup>226</sup> LAWRENCE A. GREENFELD ET AL., U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 11 (1998), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/vi.pdf>.

<sup>227</sup> See, e.g., TERENCE P. THORNBERRY ET AL., GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE (2003); Nan Marie Astone, *Are Adolescent Mothers Just Single Mothers?*, 3 J. RES. ON ADOLESCENCE 353 (1993); Rebekah L. Coley & P. Lindsay Chase-Lansdale, *Adolescent Pregnancy and Parenthood: Recent Evidence and Future Directions*, 53 AM. PSYCHOL. 152 (1998); Ariline T. Geronimus, *Damned If You Do: Culture, Identity, Privilege, and Teenage Childbearing in the United States*, 57 SOC. SCI. & MED. 881 (2003); Greg Pogarsky et al., *Developmental Outcomes for Children of Young Mothers*, 68 J. MARRIAGE & FAM. 332 (2006); Greg Pogarsky, Alan J. Lizotte & Terence P. Thornberry, *The Delinquency of Children Born to Young Mothers: Results from the Rochester Youth Development Study*, 41 CRIMINOLOGY 101 (2003).



women who married before eighteen were also likely to be pregnant (forty-eight percent, compared to three percent of women who married as adults).<sup>228</sup> Research has consistently shown that the children of mothers who begin childbearing at a young age have increased risks of various adverse outcomes. The elevated risks extend to children born later in the mother's life,<sup>229</sup> and include behavior problems and educational underachievement.<sup>230</sup> The risk of adverse outcomes for the children of young mothers continues into adulthood, and includes a greater likelihood of poverty,<sup>231</sup> unemployment,<sup>232</sup> and becoming young parents themselves.<sup>233</sup>

Researchers posit that factors tending to coexist alongside early parenthood contribute to adverse outcomes for children.<sup>234</sup> For example, "women who initiate childbearing at young ages are more likely to experience disorder in the process of family formation, . . . [and] the stress associated with structural disadvantage and family disruption increases the likelihood of the mother's own antisocial behavior, especially drug use."<sup>235</sup> Conversely, as Professors Cahn and Carbone have observed, older parents tend to bring greater resources – financial and emotional – to childrearing. They point out that, in addition to generally being wealthier, "[p]arents in their late 20s are better educated, psychologically more mature, and more likely to interact with and stimulate young children than are younger parents."<sup>236</sup>

Studies of the developmental outcomes of children born to young mothers have not, however, isolated the mothers' marital status. It is thus possible that children of young married mothers fare better than those raised by unmarried young mothers. An intact marital family may conceivably insulate children of young mothers from experiencing the effects of the various risk factors associated with early childbearing.

At the same time, however, early marriers tend to endure many of the same life experiences associated with adverse outcomes for children: They are less likely to complete high school and attain the social and human capital needed

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<sup>228</sup> Le Strat, Dubertet & Le Foll, *supra* note 5, at 526.

<sup>229</sup> Pogarsky et al., *supra* note 227, at 333.

<sup>230</sup> Coley & Chase-Lansdale, *supra* note 227, at 158; Lauren S. Wakschlag et al., *Maternal Age at First Birth and Boys' Risk for Conduct Disorder*, 10 J. RES. ON ADOLESCENCE, 417, 432-33 (2000).

<sup>231</sup> Sara Jaffee et al., *Why Are Children Born to Teen Mothers at Risk for Adverse Outcomes in Young Adulthood? Results from a 20-year Longitudinal Study*, 13 DEV. & PSYCHOPATHOLOGY 377, 391 (2001).

<sup>232</sup> *Id.* at 389.

<sup>233</sup> J.B. Hardy et al., *Like Mother, Like Child: Intergenerational Patterns of Age at First Birth and Associations with Childhood and Adolescent Characteristics and Adult Outcomes in the Second Generation*, 34 DEV. PSYCHOL. 1220, 1229 (1998).

<sup>234</sup> Pogarsky et al., *supra* note 227, at 333.

<sup>235</sup> *Id.*

<sup>236</sup> CAHN & CARBONE, *supra* note 172, at 55 (citations omitted).

for financial security, they experience higher levels of family dissolution, and they tend to exhibit ineffective parenting styles. All of these factors – reduced parental educational attainment,<sup>237</sup> economic disadvantage,<sup>238</sup> family disruption (including changes in parent figures and caregivers),<sup>239</sup> and poor parenting styles<sup>240</sup> – likely increase the risk of negative outcomes for children of young mothers, married and unmarried alike.

### III. REGULATORY LAG: THE INCOMPATIBILITY OF MODERN ADOLESCENCE AND MODERN MARRIAGE

That the median age at first marriage is higher now than at any other time in the nation's history reflects ongoing adaptation to changing social contexts. Some young people nonetheless want to marry, will obtain (if they are under the age of presumptive consent) their parents' or judicial consent, and will marry with predictably poor results.

The empirical evidence of the costs of early marriages alone should prompt rethinking of current policy extending them civil and legal recognition. Yet the law recognizes adolescents' decisionmaking competence in other arguably analogous contexts, such as abortion.<sup>241</sup> Denying young individuals the ability to marry based solely on the empirical evidence is arguably justified; it would fail, however, to provide a principled justification for the different treatment of young people in the marital than in analogous decisionmaking contexts.

This Part argues that marital capacity *is* different: sustaining the modern marriage requires not only the decisional capacity required for valid legal consent, but also a variety of psychosocial and other adult-level capacities that young people will not have reliably acquired until their early twenties. Thus, a principled distinction does exist between adolescents' marital capacity and other decisionmaking capacities. This Part argues that adolescents and emerging adults lack the former, even while they may possess the latter.

#### A. *Reconceptualizing Marital Capacity*

Marriage law has essentially adopted from the law of contract the concept of legal consent. For a valid contract, an individual must have the capacity to understand the nature of an agreement and to enter it willingly. That the individual is unlikely to successfully perform the contract will not invalidate it.

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<sup>237</sup> THORNBERRY ET AL., *supra* note 227, at 65.

<sup>238</sup> *Id.*

<sup>239</sup> Astone, *supra* note 227; Rand D. Conger et al., *A Family Process Model of Economic Hardship and Adjustment of Early Adolescent Boys*, 63 CHILD DEV. 526, 537 (1992).

<sup>240</sup> Rolf Loeber & Maga Stouthamer-Loeber, *Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency*, 7 CRIME & JUST. 29 (1986).

<sup>241</sup> *See, e.g.,* Bellotti v. Baird, 443 U.S. 622 (1979) (extending to minors the right to terminate a pregnancy but upholding parental consent laws with the provision that a judicial bypass procedure be available).

This Part argues that, in light of the evidence of the previous Parts, and in light of what is known about adolescent cognitive development (relevant aspects of which are summarized below), adolescents and emerging adults have the cognitive capacity to give what currently amounts to legally valid consent to marriage, but they lack the psychosocial capacity to “perform” the contract. This Part further argues that both of these are required for “marital capacity,” and thus both ought to be required for a valid marriage.

### 1. Capacity to Consent

Freely given consent has long been the sine qua non of a valid marriage.<sup>242</sup> U.S. marriage law derives from contract law three basic requirements for valid consent: legal capacity, mental or cognitive competence, and voluntariness (absence of duress or undue influence).<sup>243</sup>

Legal capacity refers to the presumptive ability to enter binding contracts at all. The law variously withholds from certain categories of individuals the power to enter contracts, or it refuses to enforce against categories of individuals agreements they have made.<sup>244</sup> Categorical capacity/incapacity reflects a determination that an identifiable group of individuals predictably lacks some characteristic necessary to perform an act of legal consequence. Enslaved people, married women, minors, and the mentally ill have all been denied legal capacity at some point in the history of the United States.<sup>245</sup> Into the nineteenth century, for example, women lost their separate legal identities upon marrying, as well as the capacity to take legal action in their own names absent their husbands’ concurrence.<sup>246</sup>

The requirement of legal capacity today operates to exclude fewer categories of individuals than it once did, instead more narrowly aiming to identify those whose members lack a minimum level of cognitive and decisionmaking competence. Minors and the mentally ill continue to presumptively lack legal capacity; the members of both groups are deemed to

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<sup>242</sup> To consent is “[v]oluntarily to accede to or acquiesce in what another proposes or desires; to agree, comply, yield.” OXFORD ENGLISH DICTIONARY (Oxford University Press ed., 2d ed. 1989).

<sup>243</sup> See RESTATEMENT (SECOND) OF CONTRACTS §§ 12-16 (1981); *id.* § 12 cmt. a (defining capacity as “the legal power which a normal person would have under the same circumstances,” thus contemplating both legal capacity and mental competency).

<sup>244</sup> *Id.* § 12.

<sup>245</sup> *Id.* § 12 cmt. b. Contract law distinguishes incompetence due to pathological mental illness from age-related immaturity. Thus in discussing the “wide variety of types” of mental incompetency, the *Restatement (Second)* includes “congenital deficiencies in intelligence, the mental deterioration of old age, the effects of brain damage caused by accident or organic disease, and mental illnesses evidenced by such symptoms as delusions, hallucinations, delirium, confusion and depression.” *Id.* § 15 cmt. b.

<sup>246</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*442-43. A wife’s legal personhood was “incorporated and consolidated into that of the husband.” *Id.* at \*430.

possess insufficient judgment and understanding to enter an agreement to which they should be held.<sup>247</sup>

The other requirements for legally valid consent – mental/cognitive competence and voluntariness – protect otherwise-capable individuals from the effects of agreements entered under conditions that in some way deprived them of capacity to consent. An otherwise mentally competent individual, for example, might escape a contract entered during a period of temporary incapacity, such as intoxication. Avoiding a contract by demonstrating incompetence is difficult, however, as the competence required for a legally enforceable contract is relatively minimal. The competence required to contract marriage, for example, requires simply that individuals “understand the rights, duties, and responsibilities of marriage at the time of the marriage contract.”<sup>248</sup>

Lastly, valid consent requires voluntariness – that is, consent given absent duress or undue influence. “Duress” induces a person to manifest assent to a contract as a result of a threat that leaves no reasonable alternative.<sup>249</sup> “Undue influence” results in a person’s manifesting assent to a contract because of the use of unfair persuasion by someone in position to dominate the person, or in a position of trust.<sup>250</sup> The lines between influence, persuasion, and coercion are not sharply defined, of course, and decisions always occur within a specific social context. Community norms and expectations shape preferences and can influence resulting decisions.<sup>251</sup> Individuals also may be influenced by more direct persuasion. To require voluntariness is not to require that individuals do not make decisions within analytical vacuums; instead, it aims to ensure a minimum level of independent thought and volitional behavior.

Legally valid consent thus requires cognitive and decisionmaking competence – an individual must have legal capacity (itself a proxy for

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<sup>247</sup> Minors gain legal capacity once they reach the age of majority, and upon gaining or regaining capacity, both minors and the mentally ill may elect to either ratify or disaffirm an agreement entered during their period of incapacity. RESTATEMENT (SECOND) OF CONTRACTS § 12; *see also* Hunt v. Hunt, 412 S.W.2d 7, 17 (Tenn. Ct. App. 1965) (holding that a person who lacks mental competence at the time marriage was entered may nonetheless ratify the decision to marry upon regaining competence and by doing so validate the marriage); Elizabeth Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 560 (2000).

<sup>248</sup> Nave v. Nave, 173 S.W.3d 766, 774 (Tenn. Ct. App. 2005).

<sup>249</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 175-177.

<sup>250</sup> *Id.* § 176. As is the case with nonage, however, a person who enters a marriage under duress or as a result of undue influence may choose later to either invalidate or ratify the marriage contract. *Id.* General contract law provides that if the other party to the transaction induced the assent, the contract is voidable, but if a third party induced the assent without the knowledge of the other party to the transaction, who has in good faith relied on the contract, the contract is valid. *Id.* Courts deciding the validity of marriages allegedly entered under duress or undue influence have not applied this exception, however.

<sup>251</sup> *See supra* note 121 and accompanying text.

presumptively adequate cognitive and decisionmaking abilities), must be competent to understand the nature of marriage and the marital obligation, and must undertake it voluntarily.<sup>252</sup>

## 2. Capacity to Sustain

It is one thing to make a marital commitment; it is another to keep it. Some functional aspects of marriage and marital family life have remained largely unchanged over time – couples generally share a household, bear and raise children, and assume obligations of financial support. Other aspects of married life have changed drastically. This Article argues that a historic confluence of economic and cultural developments has fundamentally altered modern marriages and also the capacities required for them to flourish. These developments have rendered marriage more difficult to sustain than at any time in history.

First, economic changes have significantly altered the means by which married couples are most likely to support their families and achieve financial security. The disappearance of home and agricultural production, then of the family wage, have pushed both members of marital couples into the paid workforce. And now virtually all non-menial jobs require “credentials” of some sort – increasingly, a college degree.<sup>253</sup> Young people with a high school education or less are likely to experience “several years of career instability characterized by periods of unemployment and a series of dead-end, minimum-wage jobs.”<sup>254</sup> The financial instability linked to low educational attainment decreases the ability to comfortably support a family and increases marital stress and the likelihood of marital dissolution.<sup>255</sup>

Second, cultural understandings of and expectations for marriage have changed significantly. Today’s normative marriage is a union of soulmates who share intimacy and romantic love, and who foster each other’s personal growth and fulfillment. As the division of labor within marriages has become less gendered, moreover, so too has the marital relationship itself; it is no longer a presumptive hierarchy in which wives submit to their husbands’ authority. Instead, marriage has become a more complex partnership of equals, who now must negotiate market and household work and childrearing in an egalitarian manner.<sup>256</sup>

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<sup>252</sup> Part III.B examines the age-related attainment of the capacity to consent.

<sup>253</sup> Marilyn J. Montgomery & James E. Cote, *College as a Transition to Adulthood*, in BLACKWELL HANDBOOK OF ADOLESCENCE 149, 156 (Gerald R. Adams & Michael D. Berzonsky eds., 2003). On average, an individual with a bachelor’s degree has between twenty and forty percent higher earnings than a high school graduate. *Id.*

<sup>254</sup> Fred W. Vondracek & Erik J. Porfeli, *The World of Work and Careers*, in BLACKWELL HANDBOOK OF ADOLESCENCE, *supra* note 253, at 109, 120.

<sup>255</sup> See *supra* notes 116, 212-13 and accompanying text.

<sup>256</sup> One study comparing the reasons given by couples for their divorces between 1949

Researchers have sought to increase the likelihood of couples successfully meeting the relational challenges of the modern marriage. They have observed that modern marriage requires partners to “continually negotiate the bargain and invest in the joint enterprise on an intimate, interpersonal level.”<sup>257</sup> It calls for ongoing, open, and mature communication – and significant effort. The relational demands of the modern marriage are different in nature and exceed in scope the demands of the institutionalized and companionate marriages of the past, and they “call[] for a level of personal responsibility and skill that perhaps only a small minority of men and women achieved in the past.”<sup>258</sup>

Scholars who study psychology and culture have described key psychological characteristics of individuals who are much more likely than others to have attained the mature levels of commitment and the communication, negotiation, and interpersonal skills that underpin the marital relationship:

[They] are secure in their unique identities as individuals beyond societal roles, including gender roles. [Individuals possessing secure personal identities are better able to] interact in productive work and love relationships[,] . . . exhibit greater capacity for both autonomy from and intimacy with others[,] and are able to commit themselves to projects and people.<sup>259</sup>

Attaining a distinct and secure personal identity and developing sophisticated relational skills go hand in hand. Individuals who “develop personal identities and a sense of self-worth *before* they enter marriages . . . [will more readily develop] greater awareness of self and other [sic] as individuals and greater skill in personal communication”<sup>260</sup> – skills that equip them to negotiate the demands of the modern marriage, enhance relational quality, and ultimately improve their chances of enjoying long-term marital success.

#### B. *The Age-Related Attainment of Marital Capacity*

The following Sections draw on research in the developmental sciences to identify the age or age range by which individuals will have reliably attained

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and 1996 in the Netherlands found that “[t]he reasons for divorce appear to have shifted from behavioral problems to relational problems.” Paul M. de Graaf & Matthijs Kalmijn, *Divorce Motives in a Period of Rising Divorce: Evidence from a Dutch Life-History Survey*, 27 J. FAM. ISSUES 483, 503 (2006). Couples have thus become less likely to cite behaviors such as violence or infidelity as causes for their divorce, and more likely to cite dissatisfaction with their relationships – growing apart, receiving insufficient attention, inability to talk to one another, etc. Women also increasingly cite dissatisfaction with the division of household labor. *Id.*

<sup>257</sup> Vannoy, *supra* note 115, at 259.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 252.

<sup>260</sup> *Id.* at 263.

each aspect of marital capacity – the cognitive and decisionmaking capacities required to voluntarily consent to marriage, and the relational capacities required to sustain it.

### 1. Cognitive Maturity in Adolescence and Capacity to Consent

This Section aims to identify the age or age range by which young people have the capacity to “*understand* the rights, duties, and responsibilities of marriage”<sup>261</sup> and in light of that understanding, determine also whether they are able to make a *voluntary choice* to enter marriage.

Cognitive capacity, including learning and reasoning from facts and information processing, improves more or less linearly throughout childhood, reaching adult-like levels by mid-adolescence.<sup>262</sup> Researchers have consistently found “the logical reasoning and basic information-processing abilities of 16-year-olds” to be “comparable to . . . [or] essentially indistinguishable” from those of adults.<sup>263</sup> By mid-adolescence, thinking processes are adult-like. According to developmental psychologist David Moshman, “[n]o theorist or researcher has ever identified a form or level of thinking routine among adults that is rarely seen in adolescents.”<sup>264</sup>

By ages fifteen or sixteen, adolescents have attained adult-like cognitive-processing capacities. In other words, they are as able as are adults to acquire, retain, and retrieve relevant information and apply to that information reasoning processes that lead to justifiable conclusions. They thus can understand the nature of marriage and its requirements, and they have the ability to make a rational decision whether to marry or not.

One might argue, however, that assent to marriage in spite of the slim chances of relationship success itself renders the typical young person’s consent to marriage irrational and therefore evidence of cognitive incompetence. That argument fails, however. Although it is arguably true that the adolescent’s or emerging adult’s decision to marry must be irrational (in light of its near-inevitable failure), the decisional defect exhibited by adolescents here does not differ significantly from the same defect demonstrated by adults on the verge of marrying. Studies have shown, for

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<sup>261</sup> *Nave v. Nave*, 173 S.W.3d 766, 774 (Tenn. Ct. App. 2005) (emphasis added).

<sup>262</sup> Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop,”* 64 AM. PSYCHOL. 583, 590-92 (2009). In previous work, I have summarized in some detail research in developmental neuroscience and psychology that has begun to explain the development of adolescents’ decisionmaking capacities. See Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1449, 1507-13 (2012); Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1110-16.

<sup>263</sup> Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 80 (2008).

<sup>264</sup> DAVID MOSHMAN, *ADOLESCENT RATIONALITY AND DEVELOPMENT* 26 (3d ed. 2011).

example, that even when they know the statistical likelihood of marital failure to be around 50%, adults estimated the likelihood of *their* marriages succeeding to approach 100%.<sup>265</sup> Given that the belief in the exceptionalism of one's impending union is characteristic of adults, the presence of the same characteristic in adolescent marital decisionmaking is insufficient to justify recharacterizing their consent as irrational or incompetent. To do so would subject adolescents to a higher standard of rationality in decisionmaking than that to which the state currently holds adults.

Adolescents' decisionmaking capacities are more susceptible than are adults', however, to being confounded by the real-world contexts in which they make decisions.<sup>266</sup> Studies found that contexts that predictably compromise adolescent decisionmaking include those requiring them to make decisions "in the heat of passion, in the presence of peers, on the spur of the moment, in unfamiliar situations, . . . [and] when behavioral inhibition is required for good outcomes."<sup>267</sup> In other words, adolescents tend to make bad decisions in emotionally charged or pressured situations, and they struggle to control impulses that lead to undesirable behavior.<sup>268</sup> Thus when they must make

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<sup>265</sup> See JEFFREY JENSEN ARNETT & JOSEPH SCHWAB, *THE CLARK UNIVERSITY POLL OF EMERGING ADULTS* 16 (2012).

<sup>266</sup> Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *DEVELOPMENTAL PSYCHOL.* 625, 625 (2005); Valerie F. Reyna & Frank Farley, *Is the Teen Brain Too Rational?*, 17 *SCI. AM. MIND* 58, 60 (2007) [hereinafter Reyna & Farley, *Teen Brain*]. Cognitive researchers have referred to this as the "competence-performance distinction." Jennifer L. Woolard et al., *Theoretical and Methodological Issues in Studying Children's Capacities in Legal Contexts*, 20 *LAW & HUM. BEHAV.* 219, 220 (1996). Consistent with these observations, studies demonstrate that not all cognitive processes mature by mid-adolescence. Some processes, such as certain aspects of working memory, continue to specialize and develop into adulthood. Beatriz Luna et al., *Maturation of Cognitive Processes from Late Childhood to Adulthood*, 75 *CHILD DEV.* 1357, 1367-68 (suggesting that all components of working memory mature by approximately age nineteen). Working memory is involved in the voluntary control of behavior (including the ability to filter irrelevant information and suppress inappropriate actions) and other complex mental abilities. *Id.*

<sup>267</sup> Valerie F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making*, 7 *PSYCHOL. SCI. PUB. INT.* 1, 1 (2006) [hereinafter Reyna & Farley, *Risk and Rationality*]; see also Eric Amsel et al., *Anticipating and Avoiding Regret as a Model of Adolescent Decision-Making*, in *THE DEVELOPMENT OF JUDGMENT AND DECISION MAKING IN CHILDREN AND ADOLESCENTS* 119, 120 (Janis E. Jacobs & Paul A. Klaczynski eds., 2005).

<sup>268</sup> Reyna & Farley, *Teen Brain*, *supra* note 266, at 60; Reyna & Farley, *Risk and Rationality*, *supra* note 267, at 1. Even though they do not generally misperceive risks (if anything, studies have tended to show that adolescents and adults both overestimate risk), adolescents tend to weigh and value benefits more heavily than risks, as compared to adults. Researchers advance a number of theories, some related to cognition and some grounded in neural development itself, to explain this. Baruch Fischhoff, *Assessing Adolescent Decision-Making Competence*, 28 *DEVELOPMENTAL REV.* 12, 19-20 (2008); see also Beatriz



decisions quickly or under time pressure, when they are highly emotional or stressed, when they are in unfamiliar situations, or when they are subjected to external or peer pressure, adolescents' decisionmaking suffers.

Some adolescents will consider whether to marry under unpressured, considered circumstances, but many will not. An individual's manifestation of assent is invalid if given involuntarily.<sup>269</sup> Adolescents may be pressured to marry by their older adult partners, parents, or other authority figures (such as religious leaders). Couples faced with unintentional pregnancy may be pressured to marry by parents or partners.

Even though some adolescents will consider marriage under stressful situations, it is a decisionmaking context that differs, for example, from impulsive and peer-influenced decisions to commit a crime, or even engage in sexual activity itself.<sup>270</sup> Instead, entering marriage is generally the sort of considered decision that researchers have found adolescents capable of making even under less-than-ideal conditions. Researchers analyzing the decisionmaking processes of adolescent girls confronted with unintended pregnancies, for example, found that those aged "14 to 17 appear to be similar to legal adults in both cognitive competence and volition."<sup>271</sup> Researchers also found that these adolescents "remain competent decision makers when facing an emotionally challenging real world decision."<sup>272</sup>

Research thus suggests that adolescents, by ages fifteen or sixteen, have the presumptive capacity to consent to marry. There are undoubtedly cases where duress or undue influence will have rendered their consent involuntary. That circumstances exist in individual cases that would legally vitiate or invalidate expressed consent does not, however, extinguish adolescents' presumptive capacity to give what qualifies as legally valid consent.

## 2. Psychosocial Development, the Prolonged Life Course to Adulthood, and Incapacity to Sustain Modern Marriage

The previous Section argued that adolescents have the cognitive capacity to consent to marriage. This Section argues that they lack other capacities

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Luna, *Developmental Changes in Cognitive Control Through Adolescence*, in 37 *ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR* 233, 237-38 (Patricia Bauer ed., 2009) [hereinafter Luna, *Developmental Changes*].

<sup>269</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 175-177 (1981).

<sup>270</sup> See Jennifer Ann Drobac, *A Bee Line in the Wrong Direction: Science, Teenagers, and the Sting to "The Age of Consent,"* 20 *J.L. & POL'Y* 63, 113-15 (2012) (proposing that a minor's consent to sex with an adult should be legally binding unless the minor voids assent during minority). At least two-thirds of U.S. adolescents have had sex by twelfth grade. Lisa J. Crockett, et al., *Adolescent Sexuality: Behavior and Meaning*, in *BLACKWELL HANDBOOK OF ADOLESCENCE*, *supra* note 253, at 371, 373.

<sup>271</sup> Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 *LAW & HUM. BEHAV.* 129, 148 (1992).

<sup>272</sup> *Id.*

required to sustain the modern marriage. In light of the empirical evidence of the instability and costs of early marriage, the appropriate inquiry in this Section might not be *whether* adolescents and emerging adults are capable of sustaining marriage, but instead *why* it is that they are not. This Section argues that the answer lies in the same historic confluence of cultural and structural factors that have made marriage more difficult for all couples to sustain, but is compounded for young people by developmental factors that shape the social and individual context in which they enter and endeavor to sustain marriage.

For individuals who marry before age twenty-two, the odds of sustaining marriage are significantly worse than they are for those who delay marriage to age twenty-two. Delaying marriage even further continues to increase marital stability, but the gains of delay lessen thereafter.<sup>273</sup> Neither attaining age eighteen, the near-universal age of majority and of presumptive marital capacity, nor obtaining the consent of parents and/or judges (a requirement universally imposed on those individuals seeking to marry prior to reaching eighteen) have an observable effect on marital stability. Only delay, along with a number of factors integrally associated with it, reliably increases marital stability.

Why are marriages entered before the early twenties so much less stable than those entered later? First, developmental scientists have amassed evidence that individuals do not reach psychosocial maturity until their early twenties. Psychologist Jeffrey Arnett has identified the period from age eighteen to twenty-five as what is now widely acknowledged to be a distinct developmental period in the modern life course, and which he has termed “emerging adulthood.”<sup>274</sup>

Developmental neuroscientists have begun to explain the neurological bases for the coexistence of adolescent cognitive maturity and socio-emotional immaturity. They have begun developing a neurologically based model primarily oriented around the development in two neural systems of the brain: that associated with *cognitive control*, and that associated with *socio-emotional maturity*. The core insight of this dual-systems model is that these two neural systems develop along different timelines.<sup>275</sup> This temporal disjunction has the potential to explain adolescents’ impulsivity and poor decisionmaking in some contexts despite their improved cognitive ability, as well as other aspects of adolescent psychology and behavior.<sup>276</sup>

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<sup>273</sup> See *supra* note 200 and accompanying text.

<sup>274</sup> JEFFREY JENSEN ARNETT, ADOLESCENCE AND EMERGING ADULTHOOD: A CULTURAL APPROACH 14 (2001).

<sup>275</sup> Steinberg, *supra* note 263, at 97–98; see also Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764, 1764 (2008) (finding that “[n]eurobiological evidence in support of the dual systems model is rapidly accumulating”).

<sup>276</sup> See *infra* notes 276–77 and accompanying text. For slightly different accounts of the

As discussed above, adolescents' basic cognitive abilities are mature by age sixteen, giving them the capacity to process information and make rational decisions. But a heightened sensitivity to rewards that increases and peaks around mid-adolescence inclines them towards risk taking, sensation seeking, and impulsivity. These inclinations may dominate or overwhelm their cognitive processes and shape their behaviors, especially in situations triggering heightened emotion or pressure.<sup>277</sup> Adolescents' susceptibility to the confounding influence of heightened reward salience on their decisionmaking begins to decline after mid-adolescence, however, while their abilities to exercise cognitive control increase, ultimately reaching mature levels in their twenties.<sup>278</sup>

Most adolescents and emerging adults actively engage in a period of identity exploration most evident in the contexts of work, worldviews, and intimate relationships.<sup>279</sup> First theorized by Erik Erikson, identity formation is a gradual process that occurs most intensely during adolescence.<sup>280</sup> During this period, individuals' beliefs, commitments and relationships tend to be in flux as they "actively explor[e] possibilities for self-definition, which may require questioning or rejecting previously held beliefs."<sup>281</sup> In the late 1960s, Erikson observed that the period of identity formation was prolonged in industrialized societies, and psychologists now believe that most identity development continues through late adolescence and into the twenties.<sup>282</sup> Following a period of exploration, individuals ideally reach identity achievement, a more stable (though not unchanging) identity status whereby they commit to

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dual-systems model, see B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 63 (2008), Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 212, 216 (2009), and Catherine Sebastian et al., *Social Brain Development and the Affective Consequences of Ostracism in Adolescence*, 72 BRAIN & COGNITION 134, 138 (2010) (discussing aspects of the dual-systems model).

<sup>277</sup> Luna, *Developmental Changes*, *supra* note 268, at 257; Steinberg, *supra* note 263, at 97–98. Researchers have more generally found the following personality traits and contextual factors correlated with suboptimal choices: sensation seeking, impulsivity, competitiveness, overconfidence, and the presence of peers. James P. Byrnes, *Cognitive Development During Adolescence*, in BLACKWELL HANDBOOK OF ADOLESCENCE, *supra* note 253, at 227, 236.

<sup>278</sup> Luna, *Developmental Changes*, *supra* note 268, at 257; Steinberg, *supra* note 263, at 97–98.

<sup>279</sup> Arnett, *supra* note 116, at 473.

<sup>280</sup> Elizabeth S. Scott, *Keynote Address: Adolescence and the Regulation of Youth Crime*, 79 TEMP. L. REV. 337, 347 (2006).

<sup>281</sup> Doug Hamman & C. Bret Hendricks, *The Role of the Generations in Identity Formation: Erikson Speaks to Teachers of Adolescents*, 79 CLEARING HOUSE 72, 72 (2005); see also James E. Marcia, *Identity in Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 159, 160 (Joseph Adelson ed., 1980).

<sup>282</sup> ARNETT, *supra* note 274, at 175.

personal, occupational, and ideological choices.<sup>283</sup> Some studies have found that both females and emerging adults who do not attend college progress towards identity achievement somewhat faster than others.<sup>284</sup> Even for non-college adolescents and emerging adults and for females, however, the majority have not reached identity achievement by age twenty-one, and researchers have only recently begun conducting studies of identity achievement beyond this age.<sup>285</sup>

This research has significant implications for adolescents' and emerging adults' capacity to sustain marriage. Modern marriage demands relationship skills and requires levels of emotional maturity that were not required to sustain the marriages of the past. Indeed, the changed meaning and function of marriage requires a level of maturity that young people will not achieve until their early twenties. Individuals' development before marriage of personal identities and relational skills, which comes only with time and life experience, promises to improve the likelihood of marriages' success and endurance.<sup>286</sup>

Finally, adolescents will not have attained the postsecondary education or work experience increasingly required to obtain well-paying work in an information- and technology-based post-industrial economy.<sup>287</sup> Low-paying work and occupational instability hinders the ability to support a family, and financial insecurity stresses the marital relationship. Indeed, the higher levels of education required in order to obtain entry into better-paying work has contributed to young people's postponing marriage and childbearing.<sup>288</sup>

Research on adolescent development thus suggests that, in light of ongoing psychological and brain development, as well as the relatively prolonged life course to adulthood in the postindustrial society, young individuals do not attain marital capacity until their early twenties. The empirical evidence of the instability of marriages entered earlier supports this conclusion. The rising age of marriage, falling rates of adolescent childbearing, and growing investment in education all reflect appropriate adaptation to the modern cultural and economic context. The law, however, has yet to similarly adapt.

### C. *Correcting Regulatory Lag: Raising the Age of Presumptive Marital Capacity*

Through a single statutory adjustment – raising the age at which individuals may marry – legislators could reduce the percentage of marriages ending in

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<sup>283</sup> James E. Marcia, *The Empirical Study of Ego Identity*, in *IDENTITY AND DEVELOPMENT: AN INTERDISCIPLINARY APPROACH* 67, 75 (H.A. Bosma et al. eds., 1994).

<sup>284</sup> See Gordon Munro & Gerald R. Adams, *Ego-Identity Formation in College Students and Working Youth*, 13 *DEVELOPMENTAL PSYCHOL.* 523 (1977).

<sup>285</sup> ARNETT, *supra* note 274, at 175; JANE KROGER, *IDENTITY DEVELOPMENT: ADOLESCENCE THROUGH ADULTHOOD* 4 (2000).

<sup>286</sup> Vannoy, *supra* note 115, at 263.

<sup>287</sup> Arnett, *supra* note 116, at 478; Vondracek & Porfeli, *supra* note 254, at 120.

<sup>288</sup> Arnett, *supra* note 116, at 478.

divorce, improve women's mental and physical health, and elevate women's and children's socioeconomic status.

### 1. Policy Considerations

Public support of marriage is costly. State and federal government subsidize marital families, which receive billions of dollars annually in direct and indirect benefits.<sup>289</sup> Divorce, too, is costly. Particularly for mothers who have forgone education and work experience within marriages, post-divorce life is more difficult than never-married life. At least some will turn to the state for public assistance to help support their families.

There is a growing body of evidence that young people do not achieve marital capacity until their early twenties. And there is overwhelming empirical evidence that early marriage ultimately harms the individuals who marry (women in particular), provides little if any benefit to children, and imposes significant costs on society.

To avoid the worst of these social costs, states should consider raising the presumptive age of marital capacity to twenty-one or twenty-two. Empirical evidence suggests that delaying marriage to twenty-two would result in the most effective increase in stability. While stability continues to improve every year after age twenty-two, it does so at a much slower rate. At the same time, a number of age-related rights already accrue at twenty-one.<sup>290</sup> Given its current existence as a marker of maturity, then, there may be less political resistance to having the right to marry also accrue at twenty-one.

States would do well to remove altogether statutory exceptions allowing adolescents younger than eighteen to marry. Again, however, given that age eighteen is currently the age of legal majority in most states and thus a marker of adult entitlement, there may be less public resistance to a policy change that retained eighteen as the minimum marital age, but that required young people between eighteen and twenty-one to obtain judicial (not parental) approval before obtaining a marriage license. Parental approval has provided little or no safeguard against the instability of early marriages. Statutes might thus impose clearer (and higher) standards for judicial approval.

### 2. Constitutional Considerations

For young people wanting to marry, state regulations denying them that ability constrain their liberty. After the Supreme Court explicitly declared marriage to be a fundamental right,<sup>291</sup> young couples challenged the age-based regulations imposed by several states as unconstitutional infringements on their right to marry. None of these challenges succeeded, however, and the courts have universally found marital age restrictions to be constitutionally

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<sup>289</sup> Bernstein, *supra* note 17, at 177.

<sup>290</sup> Every state has set age twenty-one as the legal drinking age, for example.

<sup>291</sup> See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

acceptable.<sup>292</sup> Age restrictions, courts have reasoned, do not deny couples the right to marry but instead merely delay their entry into marriage and thus do not constitute the sort of substantial interference with the fundamental right to marry that the Supreme Court has held impermissible.<sup>293</sup>

States remain free to extend greater liberties than those minimally required by the Constitution, and as discussed above, many states have done so. The statutes that allow adolescents to marry, however, are not constitutionally compelled.

The right to direct the upbringing and education of one's children has also been deemed fundamental.<sup>294</sup> Parents retain this right until their children reach the age of majority, although the state's role as *parens patriae* justifies widespread measures (for example, compulsory education requirements) aimed at ensuring the well-being of minors. Provisions requiring minors to obtain parental consent prior to marrying thus reflect respect for deference to parental authority; but they also delegate to parents the task of ensuring the adequate maturity of those minors wishing to marry. As this Article has argued, the empirical evidence makes clear that this delegation is – at best – an unsuccessful one.

#### CONCLUSION

In the preindustrial economy, marriage served pragmatic ends – ensuring economic survival through combined spousal effort, ideally aided by the labor of children. Expectations of the marital relationship were similarly pragmatic. The structural and cultural changes of postindustrial society have forced fundamental change on the institution of marriage: economic security increasingly requires extended formal education; increased gender equality and the availability of market work has eliminated the inevitability of women's economic dependence on marriage; divorce makes available a relatively destigmatized exit from unsuccessful unions; and cultural changes have raised the expectations of marital relationship, rendering it an intense intimate relationship, and substantially more difficult to sustain than in the past.

The steady rise in the median age at first marriage to what are now historic highs for both men and women evinces popular acknowledgement of, and adaptation to, the new social context of marriage. The continued existence of too-early marriages, however, unnecessarily imposes significant costs – on early marriers, their children, and society. The state does well to respect individuals' life choices, even when improvident. When those choices impose sufficiently high costs on others, however, the state and its legal institutions abrogate their proper roles by failing to respond appropriately. The high costs imposed by early marriage require a legal response through which the law, too,

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<sup>292</sup> See, e.g., *Moe v. Dinkins*, 533 F. Supp. 623, 630 (S.D.N.Y. 1981).

<sup>293</sup> See *id.*; *Zablocki*, 434 U.S. at 386.

<sup>294</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1971); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1924).

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*AGE OF MARITAL CAPACITY*

1863

adapts to the new social context within which its members enter and endeavor to sustain marriage.