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Teri Dobbins Baxter, Child Marriage as Constitutional Violation, 19 Nev. L.J. 39 (2018).

ALWD 6th ed.

Teri Dobbins Baxter, Child Marriage as Constitutional Violation, 19 Nev. L.J. 39 (2018).

APA 6th ed.

Dobbins Baxter, T. (2018). Child marriage as constitutional violation. Nevada Law Journal, 19(1), 39-84.

Chicago 7th ed.

Teri Dobbins Baxter, "Child Marriage as Constitutional Violation," Nevada Law Journal 19, no. 1 (Fall 2018): 39-84

McGill Guide 9th ed.

Teri Dobbins Baxter, "Child Marriage as Constitutional Violation" (2018) 19:1 Nevada LJ 39.

MLA 8th ed.

Dobbins Baxter, Teri. "Child Marriage as Constitutional Violation." Nevada Law Journal, vol. 19, no. 1, Fall 2018, p. 39-84. HeinOnline.

OSCOLA 4th ed.

Teri Dobbins Baxter, 'Child Marriage as Constitutional Violation' (2018) 19 Nev LJ 39

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# CHILD MARRIAGE AS CONSTITUTIONAL VIOLATION

Teri Dobbins Baxter\*

## TABLE OF CONTENTS

INTRODUCTION.....	40
I. CHILD MARRIAGE IN THE UNITED STATES .....	44
A. <i>History of Minimum Age Requirements</i> .....	44
B. <i>Current Minimum Age Requirements</i> .....	46
C. <i>Statistics and Demographics</i> .....	49
II. REASONS FOR MARRYING YOUNG.....	52
A. <i>Financial Considerations</i> .....	52
B. <i>Inheritance Rights and Child Support</i> .....	54
C. <i>Social Acceptance</i> .....	57
III. LEGAL CONSEQUENCES OF EARLY MARRIAGE.....	58
A. <i>Statutory Rape Exemptions</i> .....	58
B. <i>Emancipation (or Lack Thereof)</i> .....	62
IV. CONSTITUTIONAL RIGHTS IMPLICATED BY EARLY MARRIAGE .....	63
A. <i>Equal Protection of the Law</i> .....	63
1. <i>Marriage Exception to Statutory Rape Laws</i> .....	64
2. <i>The Common Law Marriage Exception</i> .....	67
3. <i>Lower Minimum Marriage Age for Girls</i> .....	68
B. <i>Due Process and Fundamental Rights</i> .....	69
1. <i>Children and Young Adolescents</i> .....	69
2. <i>Older Adolescents and “Mature Minors”</i> .....	72
V. PROTECTING AND RESPECTING THE RIGHTS OF MINORS .....	76
A. <i>No Marriage of Young Children</i> .....	76
B. <i>Greater Responsibility and Guidance for Courts</i> .....	77
C. <i>Less Weight Should Be Given to Parental Consent</i> .....	80

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\* Associate Dean for Faculty Development and Professor of Law, University of Tennessee College of Law. The author thanks Michael J. Higdon, Margaret Ryznar, Jeffrey Parness, Shaakirrah Sanders, Corinna Barrett Lain, and the other attendees of the Loyola Constitutional Law Colloquium Parent Rights session for their helpful comments; Jingwei Zhang, Eliza Fink, and Kaitlyn Dean for their valuable research assistance; Yvette Liebseman, Ann Scarlett, Elizabeth Pendo, Rob Gatter, Joel Goldstein, and the faculty of Saint Louis University School of Law for their helpful comments; and the University of Tennessee College of Law for its generous research support.

D. Information Necessary for Informed Consent.....	82
E. The Limits of the Law.....	83
CONCLUSION.....	84

## INTRODUCTION

When she was a scrawny 11-year-old, Sherry Johnson found out one day that she was about to be married to a 20-year-old member of her church who had raped her.

"It was forced on me," she recalls. She had become pregnant, she says, and child welfare authorities were investigating—so her family and church officials decided the simplest way to avoid a messy criminal case was to organize a wedding . . . . She says she was raped by both a minister and a parishioner and gave birth to a daughter when she was just 10 (the birth certificate confirms that). A judge approved the marriage to end the rape investigation, she says, telling her, "What we want is for you to get married."

"It was a terrible life," Johnson recalls, recounting her years as a child raising children. She missed school and remembers spending her days changing diapers, arguing with her husband and struggling to pay expenses. She ended up with pregnancy after pregnancy—nine children in all—while her husband periodically abandoned her.

"They took the handcuffs from handcuffing him," she says, referring to the risk he faced of arrest for rape, "to handcuffing me, by marrying me without me knowing what I was doing."<sup>1</sup>

States have an obligation to protect young children from abuse and exploitation. They fulfill this obligation, in part, by limiting minors' ability to make decisions that may have serious negative long-term physical, emotional, and legal consequences. For example, contracts entered into by minors are typically void or voidable.<sup>2</sup> Yet, it is surprisingly easy for a child to enter into one of the most significant contracts in our society—marriage.<sup>3</sup> Although all states have statutory minimum age requirements for individuals who want to marry, there are exceptions in some states that allow very young children—as young as eleven years old—to marry with the consent of parents or court officials.<sup>4</sup> While the consent requirements are intended to protect children, they sometimes fail to do so. The parents may be complicit in the exploitation of the

<sup>1</sup> Nicholas Kristof, *11 Years Old, a Mom, and Pushed to Marry Her Rapist in Florida*, N.Y. TIMES (May 26, 2017), <https://www.nytimes.com/2017/05/26/opinion/sunday/it-was-forced-on-me-child-marriage-in-the-us.html> [<https://perma.cc/N7D7-GWAA>].

<sup>2</sup> See, e.g., *Moran v. Williston Co-op. Credit Union*, 420 N.W.2d 353, 356 (N.D. 1988) (noting the general rule that a minor's contracts are voidable rather than void but noting that some statutes—including the one applicable in that case—make certain contracts entered into by minors void *ab initio*).

<sup>3</sup> See, e.g., *Larson v. Larson*, 192 N.E.2d 594, 597 (Ill. App. Ct. 1963) (discussing capacity requirements for "the contract of marriage").

<sup>4</sup> TAHIRIH JUSTICE CTR., *FALLING THROUGH THE CRACKS* 4 (2017), <http://www.tahirih.org/wp-content/uploads/2017/08/TahirihChildMarriageReport-1.pdf> [<https://perma.cc/63WN-YC9E>]; Kristof, *supra* note 1.

child, and judges often lack sufficient information to determine whether the marriage is in the child's best interests. In many cases, young girls who are impregnated in violation of statutory rape laws are encouraged to marry the men who raped them.<sup>5</sup> In those cases, the parents and courts are not protecting the child; they are legalizing ongoing child abuse.<sup>6</sup>

Many child advocates, scholars, and policy makers have argued for raising the minimum marriage age in all states to at least eighteen.<sup>7</sup> In May 2018, Delaware became the first state to end underage marriage without exception.<sup>8</sup> Recent efforts have been somewhat successful in Virginia, Texas, Kentucky, and Florida.<sup>9</sup> However, other states have faced resistance to bills that would have raised the minimum age. In 2017, a bill introduced in New Hampshire that would have raised the minimum marriage age from thirteen to eighteen was de-

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<sup>5</sup> Kristof, *supra* note 1; *see also* Robinson v. Commonwealth, 212 S.W.3d 100 (Ky. 2006) (describing how a mother pressured her fourteen-year-old daughter to marry the adult man who had been having sex with her since she was eight or nine years old and who had impregnated her when she was thirteen years old).

<sup>6</sup> *See* Deborah Yetter, *Kentucky's 'Child Bride' Bill Stalls as Groups Fight to Let 13-Year-Olds Wed*, USA TODAY (Mar. 3, 2018, 6:52 AM), <https://www.usatoday.com/story/news/nation-now/2018/03/03/kentuckys-child-bride-bill-stalls-groups-fight-let-13-year-olds-wed/391697002/> [<https://perma.cc/7P7W-7UUK>]. Eileen Recktenwald, the executive director of the Kentucky Association of Sexual Assault Programs, and a supporter of a bill introduced in the Kentucky legislature that would have raised the legal age for marriage to 18, told reporters "[t]his is legalized rape of children . . . . We cannot allow that to continue in Kentucky, and I cannot believe we are even debating this in the year 2018 in the United States." *Id.*

<sup>7</sup> *See, e.g.,* TAHIRIH JUSTICE CTR., *supra* note 4, at 3 ("The Tahirih Justice Center advocates for the age of marriage to be set at 18 in every state."); Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1822 (2012) (concluding 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.").

<sup>8</sup> DJ McAneny, *First State Claims Another 1st: No More Child Marriages. Period.* WDEL (May 9, 2018, 4:43 PM), [http://www.wdel.com/news/first-state-claims-another-st-no-more-child-marriages-period/article\\_95ea448e-53c9-11e8-8ef5-879e7f0688b8.html](http://www.wdel.com/news/first-state-claims-another-st-no-more-child-marriages-period/article_95ea448e-53c9-11e8-8ef5-879e7f0688b8.html) [<https://perma.cc/YBA5-6JBJ>].

<sup>9</sup> In 2016, Virginia raised the minimum age to eighteen unless the minor has been emancipated by court order, VA. CODE ANN. § 20-48 (2018), and enacted detailed procedures before the court can issue such an order, VA. CODE ANN. § 16.1-331 (2018). Texas enacted a similar rule in 2017. TEX. FAM. CODE ANN. § 2.101 (West 2017) (setting eighteen as the minimum marriage age unless the minor has been emancipated by court order in Texas or another state). Florida raised its minimum marriage age to seventeen. *See* 2018 Fla. Laws ch. 81 sec. 1 (amending FLA. STAT. § 741.04 (2018)). The new law was passed by the legislature and signed into law in March 2018 and was effective as of July 1, 2018. *Id.* If a party to the intended marriage is seventeen, he or she must have the written consent of their parents or legal guardian, and the older party can be no more than two years older than the younger party. *Id.* Kentucky also recently raised the minimum marriage age to seventeen. KY. REV. STAT. ANN. § 402.210 (West 2018) (prohibiting marriage if either party is under seventeen years of age and requiring court order for marriage if either party is seventeen).

feated in the state House,<sup>10</sup> and Governor Christie of New Jersey vetoed a bill that would have raised the minimum marriage age to eighteen with no exceptions.<sup>11</sup> A bill introduced in the Kentucky legislature stalled in a Senate committee, apparently because of concerns about parental rights.<sup>12</sup> The bill was later reintroduced with a revised minimum age of seventeen, passed by the legislature, and signed into law by the Governor.<sup>13</sup>

Those who favor raising the minimum marriage age point to the startlingly high divorce rates for those who marry young, as well as the physical, mental, and economic costs associated with those marriages.<sup>14</sup> Those who wish to maintain the *status quo* tend to believe that at least in some cases—particularly when a young girl is pregnant—marriage should be an option.<sup>15</sup> Advocates on both sides of the argument focus on whether allowing minors to marry is good

<sup>10</sup> Allie Morris, *N.H. House Kills Bill that Would Raise Minimum Marriage Age to 18*, CONCORD MONITOR (Mar. 10, 2017), <http://www.concordmonitor.com/bill-on-whether-minors-can-marry-8581515> [https://perma.cc/HJK2-V2MB]. “Though the bill had unanimous backing from the House child law committee, it was toppled after a last-minute push from a handful of Republican representatives.” *Id.* The minimum age for girls was thirteen, but the minimum age for boys was fourteen for marriage between one male and one female. N.H. REV. STAT. ANN. § 457:4 (2017). The minimum age for both parties is eighteen for same-sex marriages. *Id.* Legislation was introduced in 2018 to raise the minimum age to sixteen. Adam Sexton, *N.H. House Approves Bill to Raise Marriage Age to 16*, WMUR NEWS (Mar. 6, 2018, 6:28 PM), <http://www.wmur.com/article/nh-house-approves-bill-to-raise-marriage-age-to-16/19142308> [https://perma.cc/MWQ9-NQPE].

<sup>11</sup> Brent Johnson, *Christie Rejects Ban on Marriage for N.J. Teens Under 18*, NJ.COM (May 11, 2017), [https://www.nj.com/politics/index.ssf/2017/05/christie\\_rejects\\_ban\\_on\\_marriage\\_for\\_nj\\_teens\\_unde.html](https://www.nj.com/politics/index.ssf/2017/05/christie_rejects_ban_on_marriage_for_nj_teens_unde.html) [https://perma.cc/Y638-M7AY].

<sup>12</sup> Yetter, *supra* note 6. (“The provision involving a judge appears to have bothered some lawmakers, including Sen. John Schickel, a Boone County Republican. ‘I had some problems with the bill,’ he said Thursday. ‘Decisions involving a minor child should be made by a parent, not the court.’”).

<sup>13</sup> KY. REV. STAT. ANN. § 402.210 (West 2018) (prohibiting marriage if either party is under seventeen years of age and requiring court order for marriage if either party is seventeen).

<sup>14</sup> See, e.g., TAHIRIH JUSTICE CTR., *supra* note 4, at 4; Jeremy Uecker, *Religion and Early Marriage in the United States: Evidence from the Add Health Study*, 53 J. SCI. STUDY RELIGION 392, 392 (2014) (“These negative effects associated with early marriage are a stark contrast to the typically positive effects observed for marriage in general.”).

<sup>15</sup> That was the argument made by opponents of the New Hampshire bill: they argued the age increase would block young soldiers from getting married and providing military benefits to their partners or children. Others said the change could lead to more single-parent households. “If we pass this, we will ensure forever that every child born to a minor will be born out of wedlock,” said Republican Rep. David Bates, of Windham. Morris, *supra* note 10; See also Johnson, *supra* note 11 (vetoing bill that would raise minimum marriage age to eighteen because it “does not comport with the sensibilities and, in some cases, the religious customs, of the people of [New Jersey]”); Judith Vonberg, *Kentucky: Child Marriage Ban Delayed After Opposition from Conservative Group*, INDEPENDENT (Mar. 5, 2018, 11:58 AM), <https://www.independent.co.uk/news/world/americas/kentucky-child-marriage-ban-delayed-vote-conservative-group-opposition-lawmakers-us-a8240121.html> [https://perma.cc/5228-CE38] (“Family Foundation of Kentucky expressed concern about the wording [of the proposed bill to raise Kentucky’s minimum marriage age]. Although the group does not oppose a minimum age,” it wanted parents to retain a voice in the process).

or bad policy. However, they fail to sufficiently consider (or even acknowledge) the *rights* of the minors involved.

The Constitution protects children as well as adults.<sup>16</sup> If minors are legally incapable of giving informed consent to marry, then parental and judicial consent exceptions allow minors to be married without their consent. Such marriages violate their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Allowing adults to marry minors (particularly young girls)<sup>17</sup> and take advantage of the marriage exception to states' statutory rape laws deprives the minors of the protection that the laws provide to unmarried minors. It also violates their right to bodily integrity to the extent that they are trapped in sexual relationships with their adult spouse before they are emotionally or physically ready, and before they are legally able to consent to sexual activity. Finally (and ironically), allowing minors to marry when they lack the maturity to understand or appreciate the consequences of marriage deprives them of their fundamental right to choose whether and who they will marry.

This Article argues that in order to protect their constitutional rights, children<sup>18</sup> who are incapable of giving informed consent should never be allowed to marry. While some older minors may be mature enough to make an informed choice about marriage, the Article concludes that states may restrict marriage to those over eighteen years of age. The mature minor's constitutional rights are not violated because the restriction merely delays for a few years a minor's ability to exercise his or her right to marry rather than foreclosing it entirely.<sup>19</sup> If states choose to allow those mature minors to marry, they should take their *parens patriae*<sup>20</sup> obligation seriously and conduct an evidentiary hearing to verify that the minor is not being forced or coerced into the marriage, that the minor is sufficiently mature to understand the nature and consequences of marriage, and that marriage is in the minor's best interests.

Part I of this Article traces the history of minimum age requirements in the United States, gives a brief overview of current laws regulating minimum marital age, and shares statistics and demographics of those who marry young. Part II reviews data highlighting the negative legal, emotional, and physical conse-

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<sup>16</sup> *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) ("A child, merely on account of his minority, is not beyond the protection of the Constitution.").

<sup>17</sup> Most of the marriages between minors and adults involve young girls marrying older men. TAHIRIH JUSTICE C'TR., *supra* note 4, at 3.

<sup>18</sup> The terms "child" and "children," and "minor" do not have an unambiguous meaning. In this article, I use the terms "child" and "children" to refer to any person under the age of sixteen. Unless otherwise indicated, I use the term "minor" to refer to any person under the age of eighteen. In other words, "children" are a subset of "minors."

<sup>19</sup> See Michael J. Higdon, *Polygamous Marriage, Monogamous Divorce*, 67 DUKE L.J. 79, 100 (2017) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)) (noting that courts have upheld "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship"); see also discussion *infra* Section IV.A.2.

<sup>20</sup> "The doctrine of *parens patriae* refers to duty of the government to care for infants, the insane and the infirm." *In re S.G.*, 677 N.E.2d 920, 928 (Ill. 1997).

quences experienced by many of those who enter into marriage as minors. Part III discusses the reasons why, despite the depressing statistics and likelihood of divorce, poverty, and negative health outcomes, individuals continue to marry at a young age or consent to have their child marry as minors.

In Part IV, the Article identifies constitutional rights of minors that are affected by marriage and explores how those rights may be violated when minors marry with or without the consent of a parent and/or court. It then explains why refusing to allow minors to marry does *not* violate their constitutional rights, even though some older minors may be sufficiently mature to give informed consent to marriage.

For states that choose to allow older, mature minors to marry, Part V identifies regulations and procedures that states should put in place to ensure that they are sufficiently mature to exercise their right to marry. Part V concludes by acknowledging that preventing minors from marrying will not adequately protect all minors, particularly young girls, from abuse, exploitation, poverty, or other negative outcomes associated with early marriage. However, it will prevent abusers from marrying their victims to shield themselves from statutory rape laws, and it removes the incentive to impregnate young girls in order to make it easier to marry. Their right to be protected from abuse and to decide whether to marry and whether to engage in sexual activity must be recognized and respected, even if that means waiting until they are sufficiently mature to exercise those rights themselves.

## I. CHILD MARRIAGE IN THE UNITED STATES

### A. *History of Minimum Age Requirements*

In many states, the minimum age for marriage set by statute is a relic of the common law imported from England at the founding of our nation.<sup>21</sup> While all of the original states adopted twenty-one as the statutory marriageable age without need for parental consent, most states recognized “the English common law ages of presumptive marital consent—twelve for females and fourteen for males.”<sup>22</sup> In those states, the courts upheld marriages between people above the common law ages of consent, even if they were under twenty-one and did not obtain parental consent.<sup>23</sup> In other words, the courts upheld those common law marriages even if they violated the marriage statute.

But twelve and fourteen were not the true minimum marital ages. Under English common law, girls and boys as young as seven years old were allowed

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<sup>21</sup> See, e.g., *In re Marriage of J.M.H.*, 143 P.3d 1116, 1120 (Colo. App. 2006) (concluding that “in the absence of a statutory provision to the contrary, it appears that Colorado has adopted the common law age of consent for marriage as fourteen for a male and twelve for a female, which existed under English common law.”).

<sup>22</sup> Hamilton, *supra* note 7, at 1829.

<sup>23</sup> *Id.*

to marry.<sup>24</sup> If the marriage was not consummated, either party could choose to leave the marriage before the girl turned twelve and the boy turned fourteen.<sup>25</sup> If they chose to stay married after that time, or if the marriage had been consummated, the marriage was binding (even without parental consent and without the necessity of a second ceremony).<sup>26</sup> Thus, while twelve (for girls) and fourteen (for boys)<sup>27</sup> are often cited as the minimum marriage age under common law, children much younger were allowed to enter into valid (though voidable) marriages.<sup>28</sup> The colonies generally adopted the common law rules, but several added a parental consent requirement for minor children.<sup>29</sup> The need for consent reflected concerns about parental control and the obedience of offspring, as well as concerns about property and inheritance rights.<sup>30</sup>

The minimum marriage age in French and Spanish colonies that later became part of the United States—including in parts of what are now Louisiana, California, New Mexico, Texas, Arizona, Nevada, Colorado, Wyoming, Utah, and Oklahoma—was eleven for girls and thirteen for boys.<sup>31</sup> In those areas, the Catholic Church was responsible for regulating marriage, rather than secular authorities.<sup>32</sup> “This church-based regulation of marriage would remain in place . . . [as] long as they remained French, Spanish, or Mexican territories.”<sup>33</sup>

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<sup>24</sup> *In re Marriage of J.M.H.*, 143 P.3d at 1119 (“Under English common law, children below the age of seven were incapable of marrying. After that age they could marry, but the marriage was voidable until they became able to consummate it, which the law presumed to be at age fourteen for males and twelve for females.”); see also MARTIN INGRAM, *CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1570-1640* 128 (1987); NICHOLAS L. SYRETT, *AMERICAN CHILD BRIDE: A HISTORY OF MINORS AND MARRIAGE IN THE UNITED STATES* 19 (2016); Erin K. Jackson, *Addressing the Inconsistency Between Statutory Rape Laws and Underage Marriage: Abolishing Early Marriage and Removing the Spousal Exemption to Statutory Rape*, 85 UMKC L. REV. 343, 348 (2017).

<sup>25</sup> *In re Marriage of J.M.H.*, 143 P.3d at 1119; INGRAM, *supra* note 24, at 128.

<sup>26</sup> SYRETT, *supra* note 24, at 19.

<sup>27</sup> Some of the reasons given for why girls were allowed to marry earlier included the fact that girls entered puberty earlier than boys and because women ceased being able to bear children earlier than men. *Id.* at 22.

<sup>28</sup> *Id.* at 19.

<sup>29</sup> *Id.* at 23–27.

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

<sup>31</sup> *Id.* at 27. In England, the church regulated marriage until 1753 when Parliament passed *An Act for the Better Preventing of Clandestine Marriages*. Hazel D. Lord, *Husband and Wife: English Marriage Laws from 1750: A Bibliographic Essay*, 11 S. CAL. REV. L. & WOMEN’S STUD. 1, 7 (2001). Secular regulation of marriage in the United States started earlier, in part because of the insufficient number of clergy in the colonies. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 719 (1996) (noting that the Massachusetts Bay Colony was settled by Dissenters from the Church of England who passed laws concerning marriage as early as 1639).

<sup>32</sup> SYRETT, *supra* note 24, at 27.

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



### B. Current Minimum Age Requirements

Currently, the presumptive age of marital consent is eighteen in every state except Nebraska (where the age of marital consent is nineteen) and Mississippi (where it is seventeen for boys and fifteen for girls).<sup>34</sup> But most states still allow minors to marry under specified circumstances, although those circumstances vary by state.<sup>35</sup> Individuals under eighteen can get married with parental consent in most states,<sup>36</sup> although judicial consent is often required for children under the age of sixteen.<sup>37</sup> In states such as Louisiana, parental consent is required for sixteen- and seventeen-year-olds, while judicial approval is necessary for anyone younger than sixteen.<sup>38</sup> Perhaps more surprising, many states do not have any statutory minimum age for marriage.<sup>39</sup> In those states, a minor needs parental approval, court clerk or judge approval, or both, but there is no requirement that the child be a certain age.<sup>40</sup>

In some states, clerks—not judges—approve marriage licenses for under-age applicants.<sup>41</sup> State rules also vary with respect to the proof of age that must be furnished. In some states, only specified forms of proof (such as birth certificates or drivers' licenses) are acceptable.<sup>42</sup> Others, such as California, permit proof by "affidavit by a credible witness."<sup>43</sup> Still others only require proof upon request by the clerk or judge.<sup>44</sup>

Pregnancy lowers the marriageable age in several states and the District of Columbia.<sup>45</sup> In Arkansas, New Mexico, Ohio, and Oklahoma, if a girl is preg-

<sup>34</sup> Hamilton, *supra* note 7, at 1832. Setting a younger minimum age for girls arguably violates their rights under the Equal Protection Clause of the Fourteenth Amendment. See discussion *infra* Section IV.B.

<sup>35</sup> Hamilton, *supra* note 7, at 1832.

<sup>36</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 8–9, 30–31. Most of the states that require parental consent for minors to marry only require the consent of one parent. *Id.* at 30–31.

<sup>37</sup> *Id.* at 8–9, 12.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2. Those states are Arizona, Arkansas, California, Colorado, Delaware, Idaho, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Washington, West Virginia, and Wyoming. *Id.* at 30–34. Florida and Kentucky were previously in this category, but changed their laws in 2018 to prohibit marriage for anyone under seventeen years of age. FLA. STAT. § 741.04 (2018); KY. REV. STAT. ANN. § 402.210 (West 2018).

<sup>40</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 30–34. See also Jackson, *supra* note 24, at 351–56 (discussing the minimum age requirements and exceptions in each state).

<sup>41</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 30–34.

<sup>42</sup> *Id.* at 9.

<sup>43</sup> *Id.* "Each applicant for a marriage license shall be required to present authentic photo identification acceptable to the county clerk as to name and date of birth. A credible witness affidavit or affidavits may be used in lieu of authentic photo identification." CAL. FAM. CODE § 354 (West 2018). The statute does not specify what makes a witness "credible." *Id.*

<sup>44</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 9.

<sup>45</sup> CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 9 (2004); TAHIRIH JUSTICE CTR., *supra* note 4, at 11. Those states are Arkansas, Indiana, Maryland, Nebraska, North Dakota, Oregon, South Carolina, South Dakota, Vermont,

nant, there is no minimum marriage age (although parental or judicial approval may be required).<sup>46</sup> Even if judicial approval is required, “[o]nly New York, North Carolina, Texas, and Virginia have express provisions requiring the appointment of counsel to represent minors at hearings on petitions for permission to marry, or in the case of Texas and Virginia, to be emancipated and give them the rights of an adult.”<sup>47</sup>

Furthermore, the process by which judges give approval varies widely by state.<sup>48</sup> Some states give little or no guidance and the judge may simply confirm that the child’s parents consent to the marriage without any independent questioning or investigation.<sup>49</sup> Other states, such as North Carolina and Virginia, have detailed statutory processes for judicial approval.<sup>50</sup> For example, Virginia statutes require a hearing with both parties to the marriage present, written findings confirming that the minor is not being forced or coerced into the marriage, that the marriage will not endanger the minor’s safety, and that the minor is sufficiently mature to make the decision to marry.<sup>51</sup> Finally, the court must find that marriage is in the minor’s best interest.<sup>52</sup> Notably, the statute expressly forbids relying solely on pregnancy or the “wishes of the parents or legal guardians of the minor” in making that determination.<sup>53</sup>

In states that recognize common law marriages, a minor’s common law marriage may be valid even without parental or judicial approval.<sup>54</sup> In *In re Marriage of J.M.H. & Rouse*, Willis Rouse and J.M.H. began living together in 2002 when J.M.H. was fourteen years old.<sup>55</sup> A year later, she and Rouse ap-

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and Wisconsin. TAHIRIH JUSTICE CTR., *supra* note 4, at 30–31. *See, e.g.*, MD. CODE ANN., FAM. LAW § 2-301 (West 2018) (allowing fifteen- to seventeen-year-olds to marry if “either party to be married gives the clerk a certificate from a licensed physician, licensed physician assistant, or certified nurse practitioner stating that the physician, physician assistant, or nurse practitioner has examined the woman to be married and has found that she is pregnant or has given birth to a child.”).

<sup>46</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 12.

<sup>47</sup> *Id.* at 16. Absent emancipation, minors are limited in their ability to enter into contracts. This can be a problem if they want to work, continue in school, or leave the marriage. They may not be able to hire a lawyer to represent them; they may not be able to stay in domestic abuse shelters; they may be unable to secure housing for themselves or their children. *See* discussion *infra* Section III.B.

<sup>48</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 15.

<sup>49</sup> *Id.* at 13.

<sup>50</sup> *Id.*

<sup>51</sup> VA. CODE ANN. § 16.1-333.1 (2018).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *See, e.g., In re Marriage of J.M.H.*, 143 P.3d 1116, 1119 (Colo. App. 2006) (“The common law marriage of a person is valid, regardless of whether the person has reached the age of competency as established by statute, if the person is competent under the common law.”).

<sup>55</sup> *Id.* at 1116. The opinion does not state Rouse’s age, but the circumstances indicate that he was over the age of eighteen since the opinion considers whether J.M.H. needed judicial consent to marry but expresses no such concerns about Rouse. *Id.* In addition, Rouse was

plied for a marriage license in Adams County, Colorado.<sup>56</sup> J.M.H.'s mother signed and notarized her consent to the marriage, and the county clerk approved the application and informed the couple that "they were fully registered as a legally married couple as of April 28, 2003."<sup>57</sup> In February 2004, the Weld County Department of Human Services (DHS) sought to have the marriage declared invalid because, under Colorado statutory law, judicial approval was required if one of the parties was under sixteen.<sup>58</sup> In his defense, Rouse argued that he and J.M.H. were married under the common law.<sup>59</sup>

The Court of Appeals overruled a trial court holding that judicial approval was required for a valid common law marriage if a party was under the age of sixteen.<sup>60</sup> The appellate court noted that Colorado's marriage statute expressly states that it should not be interpreted in a way that invalidates any otherwise valid common law marriage.<sup>61</sup> Since the Colorado statute did not expressly overrule the common law with respect to the minimum age for marriage, "[t]he common law marriage of a person is valid, regardless of whether the person has reached the age of competency as established by statute, if the person is competent under the common law."<sup>62</sup>

The court looked to the origins of the common law and decisions in other jurisdictions to determine the minimum common law marriage age—since Colorado courts had not answered that question—and concluded that "in the absence of a statutory provision to the contrary, it appears that Colorado has adopted the common law age of consent for marriage as fourteen for a male and twelve for a female, which existed under English common law."<sup>63</sup> Since J.M.H.

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arrested and charged with sexual assault on a child. *Id.* at 1117. Under Colorado law, "[a]ny actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim." COLO. REV. STAT. § 18-3-405 (2018).

<sup>56</sup> *In re Marriage of J.M.H.*, 143 P.3d at 1116.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1117.

<sup>59</sup> *Id.* At that time, Rouse was incarcerated on charges of sexual assault on a child and "was serving a sentence for escape and parole violation." *Id.*

<sup>60</sup> *Id.* at 1120.

<sup>61</sup> *Id.* at 1117.

<sup>62</sup> *Id.* at 1119.

<sup>63</sup> *Id.* at 1120. The court relied, in part, on *In the Interest of Miller*, 448 A.2d 25, 32 (Pa. Super. Ct. 1982) (declining to "re-examine the doctrine of common law marriage, and either abolish it or align the age of consent to that required for statutory marriage."). Common law marriage is no longer valid in Pennsylvania. 23 PA. CONS. STAT. § 1103 (2018). States that currently recognize common law marriage include Texas, TEX. FAM. CODE ANN. § 2.401 (West 2017) (although informal marriage is not allowed for individuals under the age of eighteen), Utah, UTAH CODE ANN. § 30-1-4.5 (West 2018), Iowa, *In re Toom*, 710 N.W.2d 258 (Iowa Ct. App. 2005), Kansas, *In re Estate of Antonopoulos*, 993 P.2d 637, 648 (Kan. 1999), Montana, *Snetsinger v. Montana Univ. Sys.*, 104 P.3d 445, 451 (Mont. 2004), Oklahoma, *Davis v. State*, 103 P.3d 70, 82 (Okla. Crim. App. 2004), Rhode Island, *DeMelo v. Zompa*, 844 A.2d 174, 177 (R.I. 2004), and South Carolina, *Callen v. Callen*, 620 S.E.2d 59, 62 (S.C. 2005).

was fifteen when she entered into the alleged common law marriage, the marriage was valid since the other requirements for a common law marriage were satisfied.<sup>64</sup> Presumably, even a twelve-year-old girl could enter into a common law marriage in Colorado without parental or judicial approval, so long as her husband is at least fourteen and they agree to marry the other person and live together as husband and wife (the only requirements for a common law marriage in Colorado).<sup>65</sup>

### C. *Statistics and Demographics*

While child marriages may not be common, they occur with greater frequency than many might expect. According to a study conducted by the Tahirih Justice Center, “well over 200,000 children under age 18 were married between the years 2000 and 2015 in America.”<sup>66</sup> Only two states (Virginia and Texas) restrict marriage to legal adults.<sup>67</sup> Even those states allow younger children to marry with the consent of the court.<sup>68</sup> In states with no minimum marriageable age with judicial consent, courts have approved marriages involving very young children. In Louisiana, judicial approval was given to marriages where the bride was only twelve years old.<sup>69</sup> In Florida, a pregnant eleven-year-old girl was allowed to marry.<sup>70</sup> In New Jersey, as recently as 2004 a thirteen-year-old girl was allowed to marry, and a fourteen-year-old girl was married in 2009.<sup>71</sup>

Those who marry young are more likely to have parents who married young.<sup>72</sup> Their parents are also less likely to have a college degree.<sup>73</sup> In addition, early marriage is more common among those who are of lower socioeconomic status, socially conservative, living in rural areas, and living in Southern states.<sup>74</sup> They are also likely to come from very religious families.<sup>75</sup> Although

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<sup>64</sup> *In re Marriage of J.M.H.*, 143 P.3d at 1120. *See also* *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987) (“A common law marriage is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship.”).

<sup>65</sup> *Lucero*, 747 P.2d at 663.

<sup>66</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 3.

<sup>67</sup> *Id.*

<sup>68</sup> *See* VA. CODE ANN. § 20-48 (2018) (“The minimum age at which persons may marry shall be 18, unless a minor has been emancipated by court order.”); TEX. FAM. CODE ANN. § 2.101 (West 2017) (setting eighteen as the minimum marriage age unless the minor has been emancipated by court order in Texas or another state).

<sup>69</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 8.

<sup>70</sup> *Id.* at 9.

<sup>71</sup> Kristof, *supra* note 1.

<sup>72</sup> Hamilton, *supra* note 7, at 1841.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*; *see also* SYRETT, *supra* note 24, at 265.

<sup>75</sup> Hamilton, *supra* note 7, at 1841. The relationship between religion and early marriage is somewhat complicated. *See* Uecker, *supra* note 14.

many believe that child marriage is a problem peculiar to Muslim communities, advocacy organizations note that the practice cuts across many faiths, including Christian, Hindi, and Buddhist.<sup>76</sup> Indeed, the religious institutions or denominations may not promote or condone child marriage; instead, it may be “parents working to safeguard a moral standard.”<sup>77</sup>

There are also racial and gender differences between those who marry young and those who do not. Among girls, White and Latina girls are most likely to marry early, and African-American girls are least likely to do so.<sup>78</sup> With respect to men, Latino men are most likely to marry young, followed by White men.<sup>79</sup> African-American men are least likely to marry early.<sup>80</sup> African-Americans also have the lowest rates of marriage overall.<sup>81</sup>

The majority of the marriages in which at least one party is a minor involve minor girls marrying adult men.<sup>82</sup>

For example, records from the Virginia Department of Health show that from 2004 to 2013, nearly 4,500 children were married. Nearly 90% of them were girls, nearly 90% married adults, and some of those adults were decades older. Similar records from Maryland show that 3,100 children were married from 2000 to 2014. Again, the vast majority of them were girls marrying adult men.<sup>83</sup>

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Mormons, conservative Protestants, and adherents to ‘other’ religions (i.e., those not specified in the coding scheme employed here) have higher odds of early marriage than do those who are not tied to any religious tradition. These differences are attenuated, however, when the social (or material) aspects of religion are considered, as well as religious salience (which taps one’s proclivity to enact a religious schema). Religious salience explains some of the association between religious service attendance and early marriage, and biblical inerrancy (which is associated with the elevation of a particular religious schema over other schemas) also explains why religious salience is associated with early marriage (as those with higher religious salience are also more likely to be biblical inerrantists).

*Id.* at 410. Those who attended school with Mormon or conservative Protestant peers were also more likely to marry young, even if they were not religious themselves. *Id.* Moreover, social factors may override religious beliefs in some circumstances. For example, African American Protestants tend to be highly religious and share many of the same beliefs about family as conservative Protestants, but had lower rates of early marriage. *Id.* at 411. The study author concluded that “structural barriers to marriage experienced by black Americans (including poverty, high unemployment, high incarceration rates, etc.) can override the cultural encouragement to marry provided by religious institutions.” *Id.*

<sup>76</sup> Ashley Belanger, *Child Marriage and Religion in the United States*, TEEN VOGUE (Sept. 7, 2017 8:00 AM), <https://www.teenvogue.com/story/child-marriage-and-religion-in-the-unit-ed-states> [https://perma.cc/9A48-U6BV] (“A National Marriage Survey conducted by Tahiri in 2011 recorded responses from girls involved in child marriages from Hindu, Buddhist, Catholic, Baptist, Muslim, and other faiths.”).

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

<sup>78</sup> Hamilton, *supra* note 7, at 1843.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> TAHIRI JUSTICE CTR., *supra* note 4, at 3.

<sup>83</sup> *Id.* at 3 (footnotes omitted).

These statistics prove that those who marry young are not typically teenage sweethearts, both of who are minors. Instead, the marriage is typically between young girls and older men.

The age disparity raises troubling questions about whether these young girls are being coerced into the marriage, particularly when the young bride has not completed school or when the groom could otherwise be prosecuted for statutory rape. Young girls are also uniquely vulnerable since teen girls “are much more likely to become pregnant if they have an older intimate partner.”<sup>84</sup> Consequently, young wives are likely to become mothers before they are physically or emotionally mature enough for that responsibility.<sup>85</sup>

There is significant evidence that those who marry young are more likely to “suffer adverse health consequences, including depression, than those who marry as adults.”<sup>86</sup> Women who marry before adulthood are 50 percent more likely to drop out of high school, and four times less likely to get a college degree.<sup>87</sup> “And the correlation between educational attainment and income is so robust and unambiguous that it hardly bears repeating.”<sup>88</sup> Unsurprisingly, “[e]arly marriage also correlates with future poverty.”<sup>89</sup> These statistics are even more disturbing in light of the fact that nearly 80 percent of marriages entered into when the parties are in their teens end in divorce.<sup>90</sup> Thus, the women are more likely to be left without the education or skills that will help them support themselves and any children they have.

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<sup>84</sup> Jackson, *supra* note 24, at 375 (citing Madeline Zavodny, *The Effect of Partners' Characteristics on Teenage Pregnancy and Its Resolution*, 33 FAM. PLAN. PERSP. 192, 195 tbl. 2 (2001)).

<sup>85</sup> Girls who are physically or sexually abused are “six times more likely to become pregnant.” TAHIRI JUSTICE CTR., *supra* note 4, at 5 (quoting *Dating Abuse Statistics*, LOVEISRESPECT, [http://www.loveisrespect.org/pdf/Dating\\_Abuse\\_Statistics.pdf](http://www.loveisrespect.org/pdf/Dating_Abuse_Statistics.pdf) [<http://perma.cc/B92N-83ZY>] (last visited Nov. 11, 2018)).

<sup>86</sup> *Id.* at 11; Hamilton, *supra* note 7, at 1847. Child marriages have been linked to a variety of psychiatric disorders, with the highest incidences of “major depressive disorder, nicotine dependence, and specific phobias” and “the strongest association with antisocial personality disorder.” *Id.* (citing Yann Le Strat et al., *Child Marriage in the United States and Its Association with Mental Health in Women*, 128 PEDIATRICS 524, 526 (2011)). The sample relied on in the study cited by Professor Hamilton was conducted in 2001 and 2002, and cultural and demographic shifts have taken place in the ensuing sixteen to seventeen years. *See* Le Strat et al., *supra* at 525. For example, at that time, child marriage was associated with Black or Native American ethnicity. *Id.* at 526. As marriage rates among African Americans declined generally, the rates of child marriage also declined. *See* Hamilton, *supra* note 7, at 1843. Later studies have confirmed the negative associations with early marriage, notwithstanding demographic shifts. Uecker, *supra* note 14.

<sup>87</sup> Jackson, *supra* note 24, at 357; Hamilton, *supra* note 7, at 1846.

<sup>88</sup> Hamilton, *supra* note 7, at 1846.

<sup>89</sup> *Id.* at 1847.

<sup>90</sup> *Id.* at 1845; *see also* TAHIRI JUSTICE CTR., *supra* note 4, at 4 (“Between 70% and 80% of marriages involving individuals under age 18 end in divorce.”).

## II. REASONS FOR MARRYING YOUNG

According to Justice Kennedy's opinion in *Obergefell v. Hodges*, "[c]hoices about marriage shape an individual's destiny. . . . [B]ecause 'it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.'"<sup>91</sup> Historians and sociologists are in partial agreement with Justice Kennedy. While a desire for security has been a consistent motivating factor for marriage, until fairly recently in human history, marriage was also about property, legitimacy, and social acceptance and not necessarily about romantic connections.<sup>92</sup> As society changed and property and inheritance were no longer tied to marriage and legitimacy, and as women gained access to economic independence, the reasons why couples marry have changed. The timing of marriages changed as well.<sup>93</sup> Couples, and particularly women, began to delay the age when first married, and child marriages became less common.<sup>94</sup>

Moreover, childhood itself was understood differently before the twentieth century.

[E]arlier Americans . . . reckoned age differently than we do. They did not believe, for instance, that there were particular ages at which a person should go to school (especially if there were no schools), start working, or get married. These things happened when a person was large enough or able enough or financially prepared enough, and those moments might come at different times for different people.<sup>95</sup>

Given the changes in society and the risks and negative outcomes associated with early marriage, it is worth considering why individuals married young in the past, and why child marriages persist in modern America.

A. *Financial Considerations*

In the Early Modern period (roughly 1500-1800), marriage was informal, and unions between wealthy families were characterized by the exchange of property.<sup>96</sup> In more recent history, marriage among the wealthy and aristocratic families often had more to do with wealth transfers than emotional attach-

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<sup>91</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (quoting *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003)).

<sup>92</sup> *Id.* at 2595 ("[M]arriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman.") (citing N. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 9-17 (2000) and S. COONTZ, *MARRIAGE, A HISTORY* 15-16 (2005)).

<sup>93</sup> Hamilton, *supra* note 7, at 1835.

<sup>94</sup> *Id.*

<sup>95</sup> SYRETT, *supra* note 24, at 3.

<sup>96</sup> Hamilton, *supra* note 7, at 1824.

ments.<sup>97</sup> Couples from more modest families had more freedom to choose their own partners.<sup>98</sup> However, in many instances, parents and even extended family members exerted some degree of influence.<sup>99</sup> “Although children of middling status were often allowed to take the initiative in finding a spouse, their parents did expect to be consulted . . . . In the last resort, parents who disapproved strongly of their offspring’s choice of spouse might resort to moral, physical or—most commonly—financial pressure.”<sup>100</sup>

Financial considerations also help explain why girls married younger than boys.<sup>101</sup> Until the mid-twentieth century, women had few employment prospects and the available options offered “generally dismal” pay.<sup>102</sup> “Unlike men, women were largely defined through their marriages; opting for an appropriate mate early on in life might be the best chance a girl would have.”<sup>103</sup> For boys, marriage meant financial responsibility for his wife and any children they might have.<sup>104</sup> Consequently, boys had an incentive to delay marriage until they were older and capable of providing for their families.<sup>105</sup>

Today, women generally have the same education and employment opportunities as men.<sup>106</sup> With easier access to birth control, more women are also able to delay childbearing and spend more time in school and pursuing career opportunities.<sup>107</sup> Thus, women are not as dependent upon men for financial support, and marriage is no longer seen as a necessary path to long-term security.<sup>108</sup> But these generalizations do not hold true for all women. Women in poor and rural communities may not have as many opportunities as women in

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<sup>97</sup> INGRAM, *supra* note 24, at 137; *see also* SYRETT, *supra* note 24, at 16 (noting that many of the statutes in the original American colonies that set a minimum marriage age “were concerned more with regulating access to the inherited wealth of daughters than they were of protecting those daughters from marriage.”).

<sup>98</sup> INGRAM, *supra* note 24, at 138.

<sup>99</sup> *Id.* at 137.

<sup>100</sup> *Id.* at 139.

<sup>101</sup> *See* SYRETT, *supra* note 24, at 5 (noting that in “the vast majority of marriages where one party is a legal minor, that minor is a girl.”).

<sup>102</sup> *Id.* at 5; *see also* R. B. OUTHWAITE, *THE RISE AND FALL OF THE ENGLISH ECCLESIASTICAL COURTS, 1500-1860* 51–52 (J. H. Baker ed., 2006) (noting that some scholars have argued that “[f]emale age at marriage . . . was shaped by the opportunities open to women in the labour market: the better their economic prospects, the later they married.”).

<sup>103</sup> SYRETT, *supra* note 24, at 5.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 6 (“Wives were expected to be dependents, husbands to be breadwinners. The first status has no age qualification; the latter generally does, because men needed either to inherit their father’s estate or to establish themselves in some sort of job.”).

<sup>106</sup> Hamilton, *supra* note 7, at 1835.

<sup>107</sup> SYRETT, *supra* note 24, at 10.

<sup>108</sup> Hamilton, *supra* note 7, at 1835 (“The potential for economic self-sufficiency made marriage less essential to women’s survival.”).



wealthier or urban areas.<sup>109</sup> Perhaps it should not be not surprising, then, that marriage of minor girls is most common in poor and rural areas.<sup>110</sup>

Financial considerations may also influence parents who urge or allow their minor daughters to marry older men who impregnate the girls. Even when the pregnancy is the result of statutory rape, parents might believe that their daughter is better off marrying the father of the unborn child than having him prosecuted and jailed.<sup>111</sup> If he marries the girl, he can avoid jail<sup>112</sup> and work to support the girl and their unborn child. However, the financial benefits of marriage must be weighed against the very real risks associated with child marriage, especially the risk of ongoing sexual abuse by the adult who is no longer subject to punishment for statutory rape.<sup>113</sup>

### B. *Inheritance Rights and Child Support*

Historically, children born out-of-wedlock were not allowed to inherit from their biological fathers.<sup>114</sup>

[T]here seems to be no maxim of [the common] law less questionable than that a bastard is filius nullius . . . . No doubt the law [barring illegitimates from inheriting as next of kin] was so established on higher principles than the interest of individuals. It was to render odious illicit commerce between the sexes, and to stamp disgrace on the fruits of it; and though the punishment usually falls upon the innocent, yet it was thought wise to prohibit them from tracing their birth to a source which is deemed criminal by law and by religion. It is enough that . . . the authors of this misfortune have the power to repair it by will or by gift; the law will not interpose.<sup>115</sup>

The Supreme Court began scrutinizing laws that discriminated on the basis of legitimacy in the latter half of the twentieth century.<sup>116</sup> While some Justices

<sup>109</sup> SYRETT, *supra* note 24, at 10–11.

<sup>110</sup> *Id.* at 10.

<sup>111</sup> See Kristof, *supra* note 1.

<sup>112</sup> SYRETT, *supra* note 24, at 263.

<sup>113</sup> Many state statutory rape laws do not apply if the parties are married. See, e.g., TEX. PENAL CODE ANN. § 22.011(e)(1) (West 2017) (exempting married couple from statutory rape law); see also discussion *infra* Section III.A.

<sup>114</sup> Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 103 n.22 (“[A] bastard . . . can inherit nothing, being looked upon as the son of nobody.”) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*459).

<sup>115</sup> Powers v. Wilkinson, 506 N.E.2d 842, 846 (Mass. 1987) (alterations in original) (quoting Cooley v. Dewey, 4 Pick. 93, 94 (Mass. 1827)).

<sup>116</sup> Compare Lalli v. Lalli, 439 U.S. 259, 276 (1978) (holding that New York statute requiring the paternity of the father be declared in a judicial proceeding before his death in order for a non-marital child to inherit from the father did not violate the Equal Protection Clause), and Labine v. Vincent, 401 U.S. 532, 538 (1971) (upholding Louisiana statutes that allowed non-marital children to inherit from their fathers under some—but not all—circumstances), with Trimble v. Gordon, 430 U.S. 762, 776 (1977) (holding that Illinois statute that denied non-marital children the right to inherit from their fathers violated the Equal Protection Clause).

noted the unfairness of punishing children for the alleged sins of their parents, the Court upheld many statutes that treated non-marital children less favorably than their counterparts born to married parents.<sup>117</sup>

Yet the Court did not find all distinctions constitutionally sound. In *Gomez v. Perez*, the Court reversed a Texas Supreme Court decision holding that marital children had an enforceable right to child support from their biological fathers, but non-marital children had no such right.<sup>118</sup>

[O]nce a State posits a judicially enforceable right on behalf of children to need support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is “illogical and unjust.”<sup>119</sup>

A few years later, the Supreme Court decided *Trimble v. Gordon*, involving a challenged Illinois statute that allowed children born in wedlock, but not those born out-of-wedlock, to inherit from their fathers by intestate succession.<sup>120</sup> Deta Mona Trimble was the daughter of Jessie Trimble (her mother) and Sherman Gordon (her father).<sup>121</sup> Gordon lived with Deta Mona and Jessie for several years before his death in 1974.<sup>122</sup> During his life, an Illinois court entered a paternity order declaring him to be Deta Mona’s father and ordering him to pay child support.<sup>123</sup> Gordon died intestate and Jessie Trimble, on behalf of Deta Mona, argued that the statute prohibiting nonmarital children from inheriting by intestate succession violated the Equal Protection Clause of the Fourteenth Amendment.<sup>124</sup> The Illinois Supreme Court held that the statute was constitutional and denied Deta Mona’s claim of heirship.<sup>125</sup>

On appeal, the Supreme Court declined to treat illegitimacy as a suspect classification that would trigger strict scrutiny,<sup>126</sup> but noted that even though it was applying “less than strictest scrutiny,” the review was not “toothless.”<sup>127</sup> The court first addressed and rejected Illinois’s argument that the statute furthered its legitimate interest in promoting family relationships.<sup>128</sup>

[W]e have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships . . . . The parents have the ability

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<sup>117</sup> See, e.g., *Labine*, 401 U.S. at 535.

<sup>118</sup> *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (per curiam).

<sup>119</sup> *Id.* (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

<sup>120</sup> *Trimble*, 430 U.S. at 763–64.

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

<sup>122</sup> *Id.* at 764.

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

<sup>124</sup> *Id.* Gordon was also survived by his mother, a brother, two sisters, and a half-brother. *Id.*

<sup>125</sup> *Id.* at 765.

<sup>126</sup> *Id.* at 767.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 769.

to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.<sup>129</sup>

Consequently, while in past cases the Court had accepted the promotion of family relationships as a legitimate justification for statutes that discriminate on the basis of legitimacy, it declined to do so in *Trimble*.<sup>130</sup>

The Court found the state's second justification—its interest in the orderly disposition of property—to be “more substantial.”<sup>131</sup> The Court acknowledged states' interest in passing laws governing intestate succession, but held that any laws that discriminate against non-marital children must be “carefully tuned to alternative considerations.”<sup>132</sup> The majority concluded that the Illinois statute did not meet that standard.<sup>133</sup> “Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate.”<sup>134</sup>

Instead, alternative methods of establishing their right to a share in the intestate's estate should be recognized. In *Trimble*, the state had already established Gordon's paternity in the child support case. “That adjudication should be equally sufficient to establish Deta Mona's right to claim a child's share of Gordon's estate, for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances.”<sup>135</sup> After *Trimble*, states could no longer absolutely deny non-marital children the right to inherit from their fathers.

Forty years after *Gomez* and *Trimble*, concerns about child support and inheritance are no long sufficient to justify child marriage. Children born out-of-wedlock are entitled to support from both parents and are entitled to inherit from both parents. Even in states that require some proof of paternity, such proof can be obtained relatively easily with DNA testing. Tethering a young girl to a husband to prevent an out-of-wedlock birth provides no significant legal benefit to the child. Although it may provide financial security to the mother,<sup>136</sup> that benefit is outweighed by the significant risks and burdens associated with young marriage.

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<sup>129</sup> *Id.* at 769–70.

<sup>130</sup> *Id.* at 776. Although the Court had not held that *all* discrimination on the basis of legitimacy was unconstitutional, it had held that the Equal Protection Clause of the Fourteenth Amendment prohibited creating a right of action in favor of children for the wrongful death of a parent but excluding illegitimate children from bringing an action to enforce that right. *Levy v. Louisiana*, 391 U.S. 68, 72 (1968). Similarly, the Court held that illegitimate children must be allowed to recover workmen's compensation benefits equally with other children after the death of their parent. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 176 (1972).

<sup>131</sup> *Trimble*, 430 U.S. at 770.

<sup>132</sup> *Id.* at 772.

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

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> State and federal government have enacted laws conferring significant financial benefits on married couples.

### C. *Social Acceptance*

Throughout American history, the legal system has reflected “the belief that sex and childbirth belong within marriage, no matter the ages of the couple contracting it, even if, especially if, they have already had sex.”<sup>137</sup> In colonial America, chastity was seen as a valuable commodity and statutory rape laws were, at least in part, designed to protect that commodity.<sup>138</sup> Once a girl married, there was no further need for protection.<sup>139</sup> Even when legitimacy became legally irrelevant and sex outside of marriage was decriminalized, societal notions of propriety continued to reflect a belief in the transformative power of marriage.<sup>140</sup> “Actions performed outside of marriage that were dangerous, debasing, or immoral were transformed into safe, respectable, and moral within marriage.”<sup>141</sup>

State law exceptions to minimum age requirements for marriage when a girl is pregnant illustrate the continued belief in the “marriage cure.”<sup>142</sup> To the extent that it provides social acceptance, that acceptance must be weighed against the cost. Today, a significant percentage of children are born out-of-wedlock.<sup>143</sup> Not surprisingly, the rise in out-of-wedlock births coincides with decreased stigma in American society as a whole.<sup>144</sup> In fact, even teens who become pregnant rarely marry before giving birth.<sup>145</sup> However, in some communities, the stigma persists and even an undesirable marriage is preferable to unwed motherhood.<sup>146</sup> In a Washington Post article, Sara Siddiqui told a reporter that her parents arranged her “Islamic wedding” when she was fifteen

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States . . . have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; . . . the rights and benefits of survivors; . . . workers’ compensation benefits; [and] health insurance . . . .

*Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

<sup>137</sup> SYRETT, *supra* note 24, at 6. *See also* COCCA, *supra* note 45, at 10 (questioning whether statutory rape laws are primarily concerned with the age of the victim or if “such laws are based on proscribing sex outside of marriage, and serve to police and reinforce cultural narratives of gender and sexuality”); Hamilton, *supra* note 7, at 1832 (“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.”).

<sup>138</sup> COCCA, *supra* note 45, at 11.

<sup>139</sup> *Id.*

<sup>140</sup> SYRETT, *supra* note 24, at 6–7.

<sup>141</sup> *Id.* at 7.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 257 (citing the Centers for Disease Control report that 40.7 percent of births in 2012 were to unmarried women).

<sup>144</sup> *See* Hamilton, *supra* note 7, at 1833 (noting that “in 2007, the overwhelming majority of adolescents who gave birth were unmarried”).

<sup>145</sup> *Id.* (noting that in 2007, “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>146</sup> SYRETT, *supra* note 24, at 253–54.

because her father feared she would lose her virginity before marriage and be “damned forever.”<sup>147</sup>

Early marriage is also more common in areas that are highly religious and in which premarital sex is discouraged.<sup>148</sup> In these communities, schools may teach abstinence-only sex education, and sex is only acceptable within marriage.<sup>149</sup> “Teenage pregnancy is higher in those regions of the country, in part because teens are unprepared for what happens when they do have sex, but teen marriage (without pregnancy) may also be higher as a good-faith attempt to have sex only in sanctioned ways.”<sup>150</sup> Unsurprisingly, the highest rates of early marriage are in poor, rural, highly religious communities.<sup>151</sup>

### III. LEGAL CONSEQUENCES OF EARLY MARRIAGE

Marriage is more than a relationship status; it is a legal status that brings with it a host of legal consequences. Most disturbingly, marriage can remove the protection of statutory rape laws and leave a young rape victim married to her rapist with the approval of her parents and the courts. Since minors are not automatically emancipated upon marriage in most states, they are left without the ability to seek protective orders on their own if their spouse is abusive, and if they want to leave the marriage, they may not be able to hire a lawyer to represent them.<sup>152</sup>

#### A. Statutory Rape Exemptions

Statutory rape laws make sexual intercourse between some minors and an adult a criminal offense, but in some states, the intercourse is legal if the parties are married.<sup>153</sup> For example, in Texas sexual intercourse with a twelve-year-old is a first degree felony,<sup>154</sup> but there is no crime if the child is married to the defendant,<sup>155</sup> and judges in Texas have approved marriages of children twelve and

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<sup>147</sup> Fraidy Reiss, *Why Can 12-Year-Olds Still Get Married in the United States?*, WASH. POST (Feb. 10, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/02/10/why-does-the-united-states-still-let-12-year-old-girls-get-married/?utm\\_term=.04ac68acfe54](https://www.washingtonpost.com/posteverything/wp/2017/02/10/why-does-the-united-states-still-let-12-year-old-girls-get-married/?utm_term=.04ac68acfe54) [<https://perma.cc/339G-L7YX>].

<sup>148</sup> SYRETT, *supra* note 24, at 264.

<sup>149</sup> *Id.* at 264–65.

<sup>150</sup> *Id.* 265.

<sup>151</sup> *Id.* at 265 (noting that the rural South, which is also poorer and more religiously conservative, has the highest rates of early marriage).

<sup>152</sup> See discussion *infra* Section III.B.

<sup>153</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 4 (noting that in Texas judges approved marriages of children twelve and thirteen years old, even though sexual intercourse with such children is “a first degree felony punishable by up to life in prison”).

<sup>154</sup> TEX. PENAL CODE ANN. § 22.011 (West 2017) (defining sexual contact with a child as a first-degree felony).

<sup>155</sup> *Id.* (“It is an affirmative defense to prosecution . . . that the actor was the spouse of the child at the time of the offense”).

thirteen years old.<sup>156</sup> In nine states, the minimum marriage age is lowered if the intended wife is pregnant.<sup>157</sup> That provides an incentive for an adult who wants to marry a child to impregnate her (and for a girl who wants to marry to get pregnant) in order to increase the likelihood that they will be allowed to marry. There is also evidence that some adults marry children to avoid sexual assault convictions.<sup>158</sup>

In *Robinson v. Commonwealth*, Clarence Robinson appealed his conviction on one count of first-degree rape, three counts of second-degree rape, and three counts of third-degree rape.<sup>159</sup> The victim was Robinson's wife, S.M.H., who was fourteen years old and six months pregnant with Robinson's child when they were married in early 2000.<sup>160</sup> According to S.M.H.'s testimony at trial, she had lived with her siblings and mother in Robinson's home in Kentucky since she was eight or nine years old and he first had sexual intercourse with her when she was twelve.<sup>161</sup> He had sexual intercourse with her three to four times a week from that time on and she became pregnant with her first child with Robinson when she was thirteen years old.<sup>162</sup>

When she was six months pregnant, her mother and Robinson took her from their home in Kentucky to Knox County, Tennessee, to get married.<sup>163</sup> Although the clerk was prohibited from issuing a license when either party is under the age of sixteen, they obtained a Tennessee marriage license by presenting a birth certificate that S.M.H.'s mother altered to make it appear as though S.M.H. was sixteen years old.<sup>164</sup> S.M.H. "testified that she filled out the application as directed by the adults and did so because she thought that they would leave her in Tennessee if she did not do as instructed."<sup>165</sup> Robinson was thirty-seven years old when they married.<sup>166</sup>

S.M.H., her mother, and her siblings continued to live in Robinson's home and he continued to have sexual intercourse with her.<sup>167</sup> She gave birth to her first child in June 2000, a second child in July 2002, and a third in October 2003.<sup>168</sup> In 2005, social services removed her children from their home and

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<sup>156</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 4 (stating that between 2000 and 2014, 40,000 children were married in Texas).

<sup>157</sup> *Id.* at 2. Those states are Arkansas, Florida, Indiana, Kentucky, Maryland, New Mexico, North Carolina, Ohio and Oklahoma. *Id.* at 14.

<sup>158</sup> *Id.* at 3. "Based on Tahirih's analysis of age differences, dozens of pregnant 15-year-old girls were likely victims of statutory rape and married to the perpetrators." *Id.* at 3-4.

<sup>159</sup> *Robinson v. Commonwealth*, 212 S.W.3d 100, 101-02 (Ky. 2006).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 102.

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

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 102-04.

<sup>165</sup> *Id.* at 102.

<sup>166</sup> *Id.* at 101.

<sup>167</sup> *Id.* at 103.

<sup>168</sup> *Id.* DNA tests confirmed that Robinson was the father of all three children. *Id.*

S.M.H. confided that Robinson had been having sexual intercourse with her for years.<sup>169</sup> In a domestic violence petition, she stated that he forced her to have sexual intercourse, that she had always been unwilling, but that she was afraid because he told her that he would harm her, her children, and her siblings if she ever told anyone.<sup>170</sup>

Robinson was charged with multiple counts of first, second, and third-degree rape of S.M.H. for conduct before and during their marriage.<sup>171</sup> At the trial, Robinson did not testify or present any evidence, but he moved for a directed verdict of acquittal at the close of the prosecution's case.<sup>172</sup> Robinson argued that under Kentucky law, he could not be convicted of rape solely because S.M.H. was under sixteen years of age since the parties were married.<sup>173</sup> He further argued that there was no evidence of forcible compulsion.<sup>174</sup>

The Commonwealth argued that the marriage between Robinson and S.M.H. was in violation of Tennessee and Kentucky law and was, therefore, void.<sup>175</sup> The trial court agreed and Robinson was convicted and sentenced to sixty-one years in prison.<sup>176</sup> On appeal, the Supreme Court of Kentucky reversed the conviction with respect to the charges based on sexual intercourse during the marriage.<sup>177</sup> The court held that the marriage was merely voidable, not void.<sup>178</sup> Since it had not been annulled by a competent court, it was still valid, and Robinson was entitled to a jury instruction on marriage as a defense to the third-degree rape charges.<sup>179</sup>

It is noteworthy that the marriage was deemed valid even though S.M.H. testified that she only married him because of pressure from her mother and fear that she would be left in an unfamiliar state if she refused.<sup>180</sup> Moreover, the marriage violated the laws of both Tennessee and Kentucky; laws that were presumably enacted to protect children from choosing or being forced into ill-advised marriages. Indeed, in *Robinson* the "trial court reasoned that the state of Kentucky has a public policy of protecting those of tender years who wish to marry and that public policy is not furthered by permitting individuals to use

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

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 101–03.

<sup>172</sup> *Id.* at 103.

<sup>173</sup> *Id.* at 102, 105 ("A person who engages in sexual intercourse or deviate sexual intercourse with another person to whom the person is married, or subjects another person to whom the person is married to sexual contact, does not commit an offense under this chapter regardless of the person's age solely because the other person is less than sixteen (16) years old or mentally retarded.") (quoting KY. REV. STAT. ANN. § 510.035 (West 2018)).

<sup>174</sup> *Id.* at 102.

<sup>175</sup> *Id.* at 104.

<sup>176</sup> *Id.* at 102.

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

<sup>178</sup> *Id.* at 104.

<sup>179</sup> *Id.* at 106.

<sup>180</sup> *Id.* at 102.

marriage as a defense to avoid what would otherwise be criminal sexual contact.”<sup>181</sup> While Robinson’s conviction for the rapes occurring before the marriage were upheld,<sup>182</sup> a predator savvy enough to marry a child before the first sexual contact would be protected by the marriage exception to statutory rape laws.

A more recent case suggests that at least some adult men interested in sexual relationships with young girls are aware that marriage may provide legal cover for their otherwise criminal intentions. On March 13, 2017, Tad Cummins, a married fifty-year-old Tennessee teacher, disappeared with a fifteen-year-old student.<sup>183</sup> They were found more than a month later living in the mountains in northern California.<sup>184</sup> It is unclear whether the teen left with Cummins voluntarily, but shortly before they left another student reported seeing them kissing while at school (which they both denied).<sup>185</sup> After their disappearance, there were reports that Cummins had researched teen marriage and the age of consent online.<sup>186</sup>

In an interview months after the teen was returned to her family in Tennessee, she noted that she was in therapy for months after her return.<sup>187</sup> She said “I don’t regret it, nor do I say it was the right thing to do . . . . It was an experience I’ll have to live with the rest of my life. It’s good and bad. It’s there. No matter what we do, we’ll have to deal with it.”<sup>188</sup> Her comments indicate that she remained conflicted about the experience. If she lived in Kentucky and they had been able to marry (perhaps by falsifying her birth certificate or lying about her age), returning to her former life would have been greatly complicated.<sup>189</sup> If she decided that she did not want to be married anymore, she would have to get the marriage annulled or get a divorce. Cummins might have been able to avoid charges for kidnapping and sexual contact with a minor.<sup>190</sup> In other words, Cummins might have been able to successfully enter into a sexual relationship

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<sup>181</sup> *Id.* at 104.

<sup>182</sup> *Id.* at 106–07.

<sup>183</sup> *Missing Tennessee Teen Allegedly Abducted by Former Teacher Found in Northern California; Suspect Arrested*, KTLA 5 NEWS (Apr. 20, 2017 8:00 PM), <http://ktla.com/2017/04/20/missing-tennessee-teen-allegedly-abducted-by-former-teacher-found-in-northern-california-suspect-arrested/> [<https://perma.cc/YM3N-EDF7>].

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

<sup>185</sup> Emily Shapiro, *Tennessee Teen Allegedly Kidnapped by Former Teacher Speaks Out: “It’s Good and Bad,”* ABC NEWS (Sept. 27, 2017 10:48 AM), <https://abcnews.go.com/US/tennessee-teen-allegedly-kidnapped-teacher-speaks-good-bad/story?id=50125772> [<https://perma.cc/4TLJ-X855>].

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See discussion *infra* Section III.B.

<sup>190</sup> As it is, he may not be guilty of kidnapping if she left with him willingly. *Missing Tennessee Teen Allegedly Abducted by Former Teacher Found in Northern California; Suspect Arrested*, *supra* note 183. If the sexual contact took place after the marriage, it might have been lawful.



with a minor—who, it seems, was at least unsure about the relationship—without negative legal consequences.

### *B. Emancipation (or Lack Thereof)*

Leaving a marriage can be difficult for minors. Marriage is intended to be permanent and a couple must comply with legal processes and procedures in order to end the marriage.<sup>191</sup> However, marriage does not automatically emancipate a minor.<sup>192</sup> Since minors typically require an adult to act on their behalf in court actions,<sup>193</sup> a married minor may not be able to apply for protective orders against an abusive spouse or file for divorce.<sup>194</sup> Even if a girl tries to leave an abusive marriage, many shelters will not take in minors.<sup>195</sup> Instead, the minor is likely to be turned over to parents who supported the marriage in the first place. A minor spouse may try to hire a lawyer to assist her with legal issues, including divorce. However, minors may not be able to enter into enforceable contracts, which makes them unattractive clients.<sup>196</sup> Moreover, it may render them unable to secure housing for themselves and their children should they decide to leave the marriage.

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<sup>191</sup> “In the United States, divorce is a matter within the control of the states, subject to applicable federal constitutional limitations.” *Whitehead v. Whitehead*, 492 P.2d 939, 943 (Haw. 1972); *see also, e.g.*, GA. CODE ANN. § 19-5-3 (2018) (setting out statutory grounds for divorce); TEX. FAM. CODE ANN. § 6.001-6.007 (West 2017) (listing grounds for divorce).

<sup>192</sup> Emancipation confers on a minor all of the rights and obligations of majority. *See, e.g.*, LA. CIV. CODE ANN. art. 366 (2018):

A court may order for good cause the full or limited emancipation of a minor sixteen years of age or older. Full judicial emancipation confers all effects of majority on the person emancipated, unless otherwise provided by law. Limited judicial emancipation confers the effects of majority specified in the judgment of limited emancipation, unless otherwise provided by law.

*Id.*

<sup>193</sup> *See, e.g.*, PA. R. CIV. P. 2027 (“When a party to an action, a minor shall be represented by a guardian who shall supervise and control the conduct of the action in behalf of the minor.”).

<sup>194</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 5–6. For example, in Michigan, a minor cannot file a personal protection action. MICH. CT. R. 3.703. “If the petitioner is a minor or a legally incapacitated individual, the petitioner shall proceed through a next friend. The petitioner shall certify that the next friend is not disqualified by statute and that the next friend is an adult.” *Id.*; *See also* McAneny, *supra* note 8.

“Children under 18 have no legal standing—they cannot file for divorce, utilize a domestic violence shelter, apply for a loan or open a credit card. They cannot enter any legal contract, but until this bill was signed they could be married as a child without any way of escaping an abusive marriage,” said Rep. Kim Williams (D-Newport). “Now that we have closed this loophole in Delaware law, children will be protected from forced marriage and its dangerous consequences. I am so proud that Delaware is leading the way to protect children, and I hope that other states follow suit.”

*Id.*

<sup>195</sup> TAHIRIH JUSTICE CTR., *supra* note 4, at 5.

<sup>196</sup> *See, e.g.*, *Moran v. Williston Co-op. Credit Union*, 420 N.W.2d 353, 356 (N.D. 1988), (noting “the general rule that a minor’s contracts are voidable”).

But emancipation is not a cure-all. Even if they are willing to pay and a lawyer or landlord is willing to enter into a contract with them, many minors lack financial resources. If the child is emancipated and chooses to leave the marriage, she will have no right to support from her parents.<sup>197</sup> Since many who marry young (especially girls) do not finish high school or go to college, they are not likely to have many marketable skills, which may make it difficult to find jobs that can support them and any children they have.

#### IV. CONSTITUTIONAL RIGHTS IMPLICATED BY EARLY MARRIAGE

Those who favor allowing minors to marry argue that, in some cases, marriage is in the best interest of the minor.<sup>198</sup> Though they recognize that minors lack legal capacity and, perhaps, the maturity to make the decision on their own, they cite parental approval requirements that exist in most states and argue that parents have a fundamental right to make decisions for their minor children,<sup>199</sup> and are presumed to act in their best interests.<sup>200</sup> While parental or court approval can serve as an added layer of protection, the high divorce rate for early marriages—as well as the poor financial, emotional, and physical health outcomes—indicate that parental and court involvement do not lead to stable marriages.<sup>201</sup> More importantly, early marriage supporters ignore the fact that parents do not always act in their children's best interests, and allowing the consent of adults to replace the consent of the marrying minor is not only bad policy, it is a constitutional violation.

##### A. *Equal Protection of the Law*

The Fourteenth Amendment's Equal Protection Clause generally prohibits States from enforcing laws that require similarly situated people to be treated differently.<sup>202</sup> Instead, "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation

<sup>197</sup> For example, in Louisiana, minors are fully emancipated by marriage, and the emancipation is not affected by termination of the marriage. LA. CIV. CODE ANN. art. 367 (2018).

<sup>198</sup> Morris, *supra* note 10 (pointing out that at least one legislator who voted against the bill worried that it would lead to more children born out of wedlock, which he apparently viewed as a greater evil than allowing thirteen-year-old girls to marry).

<sup>199</sup> See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (affirming parents' fundamental right to control the upbringing of their children).

<sup>200</sup> *Id.* at 68 (noting the presumption that fit parents are presumed to act in the best interests of their children).

<sup>201</sup> See, e.g., TAHIRI JUSTICE CTR., *supra* note 4, at 3–4 (discussing the negative physical and emotional outcomes associated with early marriage); Uecker, *supra* note 14, at 392 (contrasting negative effects of early marriage with the typically positive effect of marriage in general).

<sup>202</sup> *Reed v. Reed*, 404 U.S. 71, 75–76 (1971) (recognizing that the Equal Protection Clause denies to states "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute").

to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”<sup>203</sup> Common law marriage exceptions and the marriage exception to statutory rape laws violate the Equal Protection clause because they deprive married minors of protections retained by unmarried minors with no reasonable justification. Laws that allow girls to marry at a younger age than boys are also unconstitutional because girls receive less protection from sexual predators and the negative consequences of early marriage than their male counterparts.

### 1. *Marriage Exception to Statutory Rape Laws*

While treating married couples different from unmarried couples may be justified in some circumstances, it is unjustified in the statutory rape context. Over time, statutory rape laws have been justified on many grounds.<sup>204</sup> In our nation’s earliest history, statutory rape laws were intended to protect a girl’s chastity, which was viewed as a valuable property right.<sup>205</sup> Protection against “theft” of this property right was afforded only to white, virgin girls.<sup>206</sup> Black girls’ bodies were commodified in a different way—they were seen as “naturally” impure and promiscuous and were valued for their childbearing capacity, but their chastity was not perceived to have any value.<sup>207</sup> A white girl who was not chaste was viewed as undeserving of protection.<sup>208</sup> Consequently, only a sexually inexperienced white girl could be a victim of statutory rape.<sup>209</sup> By the end of the nineteenth century, “[u]sing a narrative of sexual danger to female virtue, feminist movements and suffragists, religious leaders, and white workmen’s organizations led by the [Women’s Christian Temperance Union] WCTU agitated at the state level” to raise the age of consent to eighteen.<sup>210</sup> Then, as now, marriage was a defense to a statutory rape charge.<sup>211</sup>

In the 1970s and 1980s, “second-wave feminists” again sought to reform rape laws generally, and revisions to statutory rape laws were a part of that effort.<sup>212</sup> These reformers had the sometimes-competing goals of promoting female sexual autonomy while protecting women from the coercion and manipulation inherent in the power imbalance when the sexual partner was much

<sup>203</sup> *Id.* at 76 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

<sup>204</sup> See Jackson, *supra* note 24, at 360–61.

<sup>205</sup> COCCA, *supra* note 45, at 11.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* Of course, this left black girls especially vulnerable to rape and abuse and their abusers were rarely punished. *Id.* at 13–14 (noting that blacks were prohibited from testifying against whites in the south and “violence within black communities, if reported at all, was generally ignored by the mostly white legal establishment”).

<sup>208</sup> *Id.* at 11.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 14.

<sup>211</sup> *Id.* at 11.

<sup>212</sup> *Id.* at 16–21.

older, and between men and women generally in society.<sup>213</sup> This wave of reform brought gender-neutral language (allowing victims to be male or female) and age-span provisions, which targeted victims a minimum number of years younger than the perpetrator.<sup>214</sup>

The latter reform was intended to protect sexual autonomy by allowing sex between minors of similar ages while protecting vulnerable and impressionable children from being coerced or manipulated into having sex with older partners.<sup>215</sup> By the 1990s, states began to re-focus on preventing teen pregnancy as a key goal of statutory rape laws.<sup>216</sup> Yet, the marriage exception persisted, which suggests that protecting minors from predatory adults was less important than preventing out-of-wedlock births.<sup>217</sup>

The marriage exception ignores concerns about a minor's maturity, vulnerability to manipulation and coercion, and their lack of capacity to consent to sexual activity. Adolescents are not as mature in their decision-making in "situations that elicit impulsivity," or "that are typically characterized by high levels of emotional arousal or social coercion."<sup>218</sup> This makes adolescents especially vulnerable to peer pressure and coercion when it comes to sexual activity.<sup>219</sup> This vulnerability justifies at least some regulation of adolescent sexual activity,<sup>220</sup> and prohibiting sexual activity between a minor and one who is significantly older may protect minors from older predators (although not their peers).<sup>221</sup> Statutory rape laws provide protection because they generally avoid

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<sup>213</sup> *Id.* at 21. The problem was summarized as follows:

Every effort to protect young women against private oppression by individual men risks subjecting women to state oppression, and every effort to protect them against state oppression undermines their power to resist individual oppression. Further, any acknowledgment of the actual difference between the present situation of males and females stigmatizes females and perpetuates discrimination. But if we ignore power differences and pretend that women are similarly situated, we perpetuate discrimination by disempowering ourselves from instituting effective change.

*Id.* at 21. (quoting Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 411(1984)).

<sup>214</sup> *Id.* at 18–19.

<sup>215</sup> *Id.* at 19.

<sup>216</sup> *Id.* at 25–26. In *Michael M. v. Super. Ct. of Sonoma Cty.*, the State of California identified prevention of teen pregnancies as a justification for its statutory rape law. *Michael M. v. Super. Ct. of Sonoma Cty.*, 450 U.S. 464, 470 (1981).

<sup>217</sup> COCCA, *supra* note 45, at 27.

<sup>218</sup> Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?*, 38 J. MED. & PHIL. 256, 264 (2013). See discussion *infra* Section IV.B.

<sup>219</sup> See Steinberg, *supra* note 218, at 260 (identifying unprotected sex as one situation in which adolescent decision-making is characterized by high levels of emotional arousal or social coercion).

<sup>220</sup> *Id.* at 264–65. "[A]dolescents' relative immaturity should be acknowledged either by imposing greater restraints on their behavior than are imposed on adults . . . or by providing added protections." *Id.*

<sup>221</sup> Statutory rape laws do not prohibit sex between minors who are the same age or close in age and coercion can and does exist among peers. See Michelle Oberman, *Regulating Con-*

disputes about whether sexual activity was consensual and whether the consent was obtained through coercion, intimidation, or deception. However, if the child is married, consensual intercourse is no longer prohibited, and the child will need to prove lack of consent in order to pursue rape charges against the spouse.

In addition to the lack of legal ability to consent to sexual activity, young children may lack the practical ability to withhold consent. An adult who is a trusted family friend, religious leader, or person of influence in the community may be able to obtain consent from a child through undue influence or by use of threats. A child may not understand that consent obtained in this manner may not be valid and any resulting intercourse could still be categorized as rape. In sum, married minors may not have control over whether they engage in sexual activity.

Young girls who marry are often already pregnant and marriage is seen as the solution to the “problem” of unwed motherhood<sup>222</sup> and a way to avoid abortion.<sup>223</sup> These girls are at higher risk of complications from pregnancy and often go on to have more children while they are still young.<sup>224</sup> Since marriage removes the threat of statutory rape charges, and since parents and courts are more likely to permit a marriage if the girl is pregnant, child predators have an incentive to impregnate the girls with whom they have sex. The result may be an unwanted pregnancy followed by an unwanted marriage, followed by more unwanted pregnancies.

Concerns about minors’ capacity to consent should apply equally to minors seeking to marry. In fact, minors are deemed incapable of consenting to the marriage, which is why parental or judicial approval is required. If the minor is not capable of consenting to the marriage, there is no reason to conclude that the minor is capable of consenting to sexual intercourse or that they are any less vulnerable to deception or manipulation. The protection that is available to the minor before marriage is lost. In other words, even though unmarried minors are similarly situated to married minors in terms of immaturity and vulnerabil-

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*sensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 744 (2000).

<sup>222</sup> Indeed, some have opposed attempts to raise the minimum marriage age because it would ensure that if young girls are impregnated, their babies are guaranteed to be born out of wedlock. See, e.g., Anjali Tsui, *In Fight Over Child Marriage Laws, States Resist Calls for a Total Ban*, FRONTLINE, (July 6, 2017), <https://www.pbs.org/wgbh/frontline/article/in-fight-over-child-marriage-laws-states-resist-calls-for-a-total-ban/> [<https://perma.cc/97NA-XZP2>]. Michelle Siri, executive director of the Women’s Law Center of Maryland, opposed a bill to raise the minimum marriage age in Maryland in part because “[t]here are certain people that culturally, religiously—it is important for them to get married if they are pregnant . . . . We didn’t want to take that option away from them.” *Id.*

<sup>223</sup> New Jersey Right to Life, an anti-abortion group, opposed efforts to raise the minimum marriage age in New Jersey because its members were concerned that pregnant teens might be pressured to have abortions if they were unable to marry. *Id.*

<sup>224</sup> See, e.g., Kristof, *supra* note 1.

ity, married minors are not given the same protection as unmarried minors from sexual abuse and exploitation.<sup>225</sup>

## 2. *The Common Law Marriage Exception*

In states that recognize common law marriage, people are able to circumvent statutory protections against child marriage. In *State v. Sedlack*, the defendant was charged with indecent liberties with a child.<sup>226</sup> The child in question was a fifteen-year-old girl who was pregnant with his baby.<sup>227</sup> The defendant moved to have the charges dismissed because he claimed that the girl was his common law wife.<sup>228</sup> After a hearing, the trial court found that all of the requirements of a common law marriage were satisfied and dismissed the complaint.<sup>229</sup> Specifically, (1) both parties had capacity to enter into a common law marriage, (2) there was a present agreement to marry, and (3) “they held themselves out to the public as husband and wife.”<sup>230</sup>

On appeal, the state argued that the minor did not have capacity to marry and pointed to the state statute requiring parental consent for a minor to enter into a formal marriage.<sup>231</sup> The appellate court rejected the state’s argument. It noted that a 1913 case held that the marriage statute in effect at that time did not void the marriage of a minor without parental consent, and further noted that the marriage statute had been amended multiple times since that case was decided.<sup>232</sup> The legislature was presumed to know about the 1913 case and declined to change the statute to void such marriages.<sup>233</sup> Moreover, the court quoted a 1989 case in which it stated that “[t]here is no minimum statutory age for marriage in Kansas. The [statutory] age limitation relates only to the issuance of a marriage license without parental (or guardian) and judicial consent.”<sup>234</sup> The court concluded—without explanation or citation to authority—that “[a] fifteen-year-old has the capacity to enter into a common-law marriage”<sup>235</sup> and affirmed the trial court’s dismissal of the criminal complaint.<sup>236</sup>

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<sup>225</sup> COCCA, *supra* note 45, at 28. “Statutory rape laws purport to be about protecting those under a certain age from sexual intercourse, but marriage laws allow those under the age of consent to marry. This leaves married males and females of the same age as their unmarried counterparts unprotected, simply by virtue of their being married.” *Id.* at 27–28.

<sup>226</sup> *State v. Sedlack*, 787 P.2d 709, 710 (Kan. 1990).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 711.

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

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* (quoting *State v. Wade*, 766 P.2d 811, 815 (Kan. 1989)).

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

<sup>236</sup> *Id.* See also *Porter v. Ark. Dep’t of Health & Human Servs.*, 286 S.W.3d 686, 689–90, 696 (Ark. 2008) (holding that common law marriage entered into by sixteen-year-old girl and thirty-four-year-old man was valid).

The court's conclusion about the fifteen-year-old's capacity is consistent with the common law rule declaring twelve-year-old girls and fourteen-year-old boys capable of consenting to marriage.<sup>237</sup> However, relying on the common law presumption to allow adolescents to enter into valid common law marriages is contrary to the intent of statutory rape laws and the policies reflected in state statutes setting a higher minimum marriage age. It is also inconsistent with current scientific understanding of the adolescent brain and the decision-making abilities of adolescents.<sup>238</sup> While some studies have shown that adolescents have observational and decision making skills that are on par with those of adults, "even apparently mature adolescents lack the proper self-control necessary for good decision making even though they may, in principle, understand the relevant factual issues."<sup>239</sup> Ignoring that reality and allowing adolescents to bind themselves to another (often much older) person without parental or court consent is not only unwise, it deprives the minor of the protection afforded to other adolescents who cannot enter into sexual relationships with older adults or who must obtain parental or judicial consent to marry.

### 3. Lower Minimum Marriage Age for Girls

Marriage laws also violate the Equal Protection Clause to the extent that the minimum marriage age for boys is higher than the age for girls. The evidence shows that young marriage correlates to higher divorce, less education, mental and physical harm, and poverty.<sup>240</sup> Consequently, there is no justification for allowing girls to encounter these risks at a younger age than boys. In fact, girls face greater risk of harm in the form of pregnancy, which can bring risks of physical harm for young girls as well as make it less likely that they will continue their education.<sup>241</sup>

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<sup>237</sup> Hamilton, *supra* note 7, at 1829.

<sup>238</sup> See, e.g., Mark J. Cherry, *Ignoring the Data and Endangering Children: Why the Mature Minor Standard for Medical Decision Making Must Be Abandoned*, 38 J. MED. & PHIL. 315, 321 (2013).

<sup>239</sup> *Id.* See generally discussion *infra* Section IV.B.

<sup>240</sup> See discussion *supra* Section I.C.

<sup>241</sup> "Pregnant teens are more likely to develop pregnancy-related high blood pressure and anemia (lack of healthy red blood cells), and to go through preterm (early) labor and delivery than women who are older." *What are the Factors that Put a Pregnancy at Risk?* NAT'L INST. OF CHILD HEALTH & HUMAN DEV., <https://www.nichd.nih.gov/health/topics/high-risk/conditioninfo/factors#age> [<https://perma.cc/496D-R8A7>] (last visited Dec. 22, 2018).

Thirty percent of all teenage girls who drop out of school cite pregnancy and parenthood as key reasons. Rates among Hispanic (36 percent) and African American (38 percent) girls are higher. Educational achievement affects the lifetime income of teen mothers: two-thirds of families started by teens are poor, and nearly one in four will depend on welfare within three years of a child's birth. Many children will not escape this cycle of poverty. Only about two-thirds of children born to teen mothers earn a high school diploma, compared to 81 percent of their peers with older parents.

*Postcard: Teen Pregnancy Affects Graduation Rates*, NAT'L CONF. OF STATE LEGIS., (June 17, 2013) <http://www.ncsl.org/research/health/teen-pregnancy-affects-graduation-rates-postcard>

The higher age for boys reflects outdated notions of the role of boys/men in a marriage. Husbands were historically breadwinners and needed to be old enough to take on the financial responsibilities associated with a wife and children.<sup>242</sup> The higher age hurdle prevented boys from taking on those responsibilities prematurely. Allowing girls to marry younger may have been defensible at a time when girls did not have access to the same educational or career opportunities, and when marriage and childbearing were seen as the ultimate goal for girls, but those beliefs no longer reflect reality for many girls. A girl may choose marriage and motherhood as her ultimate path, but that choice should be made as a mature and competent adult and not as a young child or impressionable and changeable adolescent. It is not acceptable or constitutional to allow boys to be protected from the harms of early marriage longer than girls.

### *B. Due Process and Fundamental Rights*

The right to marry has been described as “the cornerstone of the family and our civilization,”<sup>243</sup> and “a fundamental right inherent in the liberty of the person”<sup>244</sup> protected under the Due Process Clause of the Fourteenth Amendment.<sup>245</sup>

Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. Indeed, the Court has noted it would be contradictory “to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.” Choices about marriage shape an individual’s destiny.<sup>246</sup>

Given the intimate nature of the relationship and the potential impact it can have on the lives of the couple, courts have generally recognized that “[t]he decision to marry should rest primarily in the hands of the individual, with little government interference.”<sup>247</sup>

#### *1. Children and Young Adolescents*

Most states require parental or judicial approval (or both) when a child or young adolescent (under the age of sixteen) seeks to marry.<sup>248</sup> Thus, the deci-

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ard.aspx [https://perma.cc/6CNH-RVF3].

<sup>242</sup> SYRETT, *supra* note 24, at 6.

<sup>243</sup> Kirkpatrick v. Eighth Judicial Dist. Ct., 64 P.3d 1056, 1060 (Nev. 2003).

<sup>244</sup> Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

<sup>245</sup> In addition to rights enumerated in the Bill of Rights, Due Process protection “extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” *Id.* at 2597.

<sup>246</sup> *Id.* at 2599 (citations omitted) (quoting Zablocki v. Redhail, 434 U.S. 374, 386 (1978)) (citing Lawrence v. Texas, 539 U.S. 558, 574 (2003)).

<sup>247</sup> Kirkpatrick, 64 P.3d at 1060.

<sup>248</sup> See discussion *supra* Section I.B.



sion to marry rests primarily in the hands of parents and the government, and not the individual minor. However, the need for parental or judicial approval is consistent with the Supreme Court's pronouncement in *Bellotti v. Baird* that "the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."<sup>249</sup> The limit is justified by concerns about children's "inability . . . to make mature choices."<sup>250</sup> Research on brain and child development has confirmed that children under the age of fourteen are less competent than those who are older.<sup>251</sup> This research strengthens the argument against allowing young children to marry. Yet *Bellotti* could be cited as support for allowing children and young adolescents to marry with parental or judicial approval.

However, *Bellotti* concerned a regulation restricting pregnant minors' ability to get an abortion.<sup>252</sup> In that context, the court's decision affected whether a young girl could get an abortion, or whether she would be required to continue the pregnancy and deliver a child.<sup>253</sup> Waiting until the girl reached majority and allowing her to make the decision herself was not an option. Parental and judicial involvement was seen as a way to assist minors in making a decision with potentially life-altering consequences. Parents may also need to make medical decisions—such as when a parent must decide whether or how to treat an ill or injured child—and those decisions may be a matter of life or death. But in life-or-death medical decisions involving minor patients, as in the case of a minor seeking an abortion, a decision must be made immediately; waiting until the child is old enough to make the decision herself may not be possible.

Parents certainly have the right to make decisions that affect their child's future.<sup>254</sup> In fact, some of the choices that have the biggest impact on a child's quality of life are made by her parents. For example, choosing to get pregnant or continue a pregnancy at a young age may impact a girl's education and future economic status, which can affect the standard of living for her children.<sup>255</sup> Choosing a wealthy or poor partner, or a supportive or abusive spouse can affect the environment in which the child will grow. But neither the law nor the child can ever have any say in those decisions (beyond prohibitions on sex with minors).<sup>256</sup>

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<sup>249</sup> *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (addressing objections to the parental notice requirement for minors seeking an abortion).

<sup>250</sup> *Id.* at 636.

<sup>251</sup> See Steinberg, *supra* note 218, at 265 (noting research concluding that "adolescents 14 and younger are likely to be less competent than those who are 15 and older").

<sup>252</sup> *Bellotti*, 443 U.S. at 624 ("These appeals present a challenge to the constitutionality of a state statute regulating the access of minors to abortions.").

<sup>253</sup> *Id.*

<sup>254</sup> See *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

<sup>255</sup> See *Postcard: Teen Pregnancy Affects Graduation Rates*, *supra* note 241.

<sup>256</sup> The Fourteenth Amendment's Due Process Clause protects the right to choose who to marry, and any attempt to restrict marriage to those the government deems "worthy" would certainly fail. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (holding that

By contrast, there is never a true *need* to marry before reaching adulthood so there is no *need* for a parent or court to consent to a minor's marriage. While there may be consequences to waiting, the option to marry once the child has reached majority always exists. Thus, although a pregnant girl may face social backlash and stigma if she gives birth out-of-wedlock, she can still marry after she gets older. Waiting will not deprive her of the opportunity to make the choice for herself. Similarly, while the child may face stigma by being born out-of-wedlock, there are no legal consequences; the child can still inherit from both parents and is entitled to support from the father.<sup>257</sup>

Allowing parents to consent to a child's marriage in effect allows the parent to consent to sexual activity on the child's behalf (since the child is legally incapable of consenting) and to make ongoing sexual activity legal.<sup>258</sup> This places the child permanently (at least until the marriage is annulled or the couple divorces) in a sexual relationship at a time when she may be physically, mentally, and emotionally unprepared for sex or its consequences. These consequences cannot be remedied by a later choice to end the marriage. For the intended spouse, delaying marriage may mean a choice between delaying sexual intercourse or facing criminal charges, if either or both intended spouses are below the statutory age for consent. However, delaying sexual intercourse until both parties are old enough to consent is not only possible, it is a public policy goal, especially for young children.

Finally, allowing parents or courts to consent to marriage on behalf of a young child or adolescent deprives her of her right to make the decision herself once she is sufficiently mature. For some parents, this is a desirable outcome. Consenting to or arranging a marriage for a child, particularly a girl, is a way to ensure that the girl follows in the cultural or religious customs of the family or community.<sup>259</sup> In other words, young marriage may be considered desirable because it limits the child's options in the future. In this context, the fundamental right of a parent to control the *upbringing* of the child crosses a line to controlling the *life* of the child.

Such control is a violation of an individual's fundamental right to make choices that affect their life; choices such as whether to marry and whether or

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bans on same-sex marriage violate the Fourteenth Amendment); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (finding unconstitutional a Virginia ban on interracial marriage); *Zablocki v. Redhail*, 434 U.S. 374, 375, 377 (1978) (holding that Wisconsin statute preventing people who are in arrears on child support obligations may not marry is unconstitutional).

<sup>257</sup> See discussion *supra* Section II.B.

<sup>258</sup> See discussion *supra* Section IV.A.

<sup>259</sup> See Fraidy Reiss, *America's Child-Marriage Problem*, N.Y. TIMES (Oct. 13, 2015), <https://www.nytimes.com/2015/10/14/opinion/americas-child-marriage-problem.html> [https://perma.cc/AEY4-WR8D] (citing survey conducted by the Tahirih Justice Center in which parents gave reasons for forcing children to marry). "Parents give many reasons for forcing their children into marriage, including controlling the children's sexuality and behavior and protecting 'family honor.' Often families use forced marriage to enhance their status or gain economic security." *Id.*

when to have children. Parents have eighteen years to influence the child's moral and religious beliefs. Allowing parents to exercise control beyond that time by making irreversible decisions while they are still minors is unreasonable. Moreover, it does not further any legitimate state interest and can be prevented simply by the passage of time. Thus, unlike life-or-death medical decision cases or cases involving pregnant girls seeking abortion, the child's right to choose whether to marry can be preserved by refusing to allow parents or judges to consent to a marriage if the child lacks the maturity and judgment necessary to consent herself.

## 2. *Older Adolescents and "Mature Minors"*

Treatment of older adolescents (from fifteen to seventeen years old)<sup>260</sup> requires a more nuanced analysis. In medical decision contexts, the "mature minor" doctrine has been put forth to justify allowing minors at least fourteen years old to make decisions regarding their own medical treatment and to consent to participation in medical research.<sup>261</sup> Research from the latter part of 2003 showed that "by age 14, many [adolescents] are capable of making informed decisions."<sup>262</sup> When researchers gave research participation information to individuals of varying ages, they determined that "by 10th grade, responses were comparable to those of adults."<sup>263</sup> Earlier research from 1978 and 1982<sup>264</sup> also led the American Academy of Pediatrics to conclude that "children aged 14 and up 'may have as well developed decisional skills as adults for making informed health care decisions.'"<sup>265</sup>

But more recent research casts doubt on that conclusion. Studies of adolescent brain development showed that adolescence is a period of "significant changes in brain structure and function"<sup>266</sup> and important changes continue into the mid-twenties.<sup>267</sup> Not only are these changes significant because they demonstrate that the adolescent brain is not fully formed, they are important because of which activities and cognitive functions are affected by the developing areas.<sup>268</sup> During adolescence, the brain systems controlling self-regulation

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<sup>260</sup> Most states recognize eighteen-year-olds as adults.

<sup>261</sup> See, e.g., Ana S. Iltis, *Parents, Adolescents, and Consent for Research Participation*, 38 J. MED. & PHIL. 332, 337 (2013).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* (citing Jean-Marie Bruzese & Celia B. Fisher, *Assessing and Enhancing Research Consent Capacity of Children and Youth*, 7 APPLIED DEVELOPMENTAL SCI. 13 (2003)).

<sup>264</sup> *Id.* at 338 (citing Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment; A Developmental Perspective*, 9 PROF. PSYCHOL. 412 (1978); Lois A. Weithorn & Susan B. Campbell, *The Competence of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589 (1982)).

<sup>265</sup> *Id.* at 338 (quoting the Am. Acad. of Pediatrics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, 95 PEDIATRICS 314 (1995)).

<sup>266</sup> Steinberg, *supra* note 218, at 259.

<sup>267</sup> *Id.*

<sup>268</sup> See *id.* at 260.

and the response to rewards are strengthened, and there is increased stimulation of the regions that respond to “arousing stimuli, like pictures of angry or terrified faces.”<sup>269</sup>

Consequently, an adolescent may be able to understand information at an intellectual level but still react more impulsively and emotionally than an adult.<sup>270</sup> Their hypersensitivity to rewards results in a tendency to engage in risky behavior such as “unprotected sex, fast driving, or experimentation with drugs.”<sup>271</sup> “During adolescence, very strong feelings are less likely to be modulated by the involvement of brain regions involved in impulse control, planning ahead, and comparing the costs and benefits of alternative courses of action.”<sup>272</sup> In other words, “[a]lthough adolescents are capable of encoding mathematical probabilities about risks and rewards, they still do not have the mature appreciation for the *meaning* of those risks and rewards, and their implications for their future adult lives.”<sup>273</sup>

This research has led to the conclusion that older adolescents may be mature enough to be trusted with some types of decisions, but not others.<sup>274</sup> Specifically, if the decision can be made deliberately, and the adolescent has the opportunity and incentive to seek the counsel of knowledgeable and responsible adults, their decisions may be comparable to those of adults.<sup>275</sup>

When it comes to decisions that permit more deliberative, reasoned decision-making, where emotional and social influences on judgment are minimized or can be mitigated, and where there are consultants who can provide objective information about the costs and benefits of alternative courses of action, adolescents are likely to be just as capable of mature decision-making as adults, at least by the time they are 15 or so.<sup>276</sup>

This reasoning could support allowing minors to make medical decisions, legal decisions, and decisions about participation in research studies. In each of these settings, there is usually an opportunity for the adolescents to consult with parents, legal or medical professionals, and other knowledgeable adults who can counsel them with respect to the risks and potential benefits of available options.

In contrast, in situations that elicit impulsivity, that are typically characterized by high levels of emotional arousal or social coercion, or that do not encourage or permit consultation with an expert who is more knowledgeable or experi-

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<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 261 (“[A]dolescents mature intellectually before they mature socially or emotionally”).

<sup>271</sup> *Id.* at 260.

<sup>272</sup> *Id.* at 260–61.

<sup>273</sup> Evan A. Wilhelms & Valerie F. Reyna, *Fuzzy Trace Theory and Medical Decisions by Minors: Differences in Reasoning Between Adolescents and Adults*, 38 J. MED. & PHIL. 268, 279 (2013) (citations omitted).

<sup>274</sup> Steinberg, *supra* note 218, at 261.

<sup>275</sup> *Id.* at 263.

<sup>276</sup> *Id.*

enced, adolescents' decision-making, at least until they have turned 18, is likely to be less mature than adults'.<sup>277</sup>

These limits on the maturity of adolescent decision-making justify not treating adolescents as adults in the criminal context, where decisions to engage in criminal behavior may be attributed, in part, to the increased impulsivity, sensation-seeking, and peer pressure experienced by adolescents.<sup>278</sup>

Deciding to get married is a decision that can fall within the category of decisions that "are typically characterized by . . . emotional arousal or social coercion"<sup>279</sup> which lead to decision-making that is less mature than that of an adult. This would be true in a variety of situations. For example, the minor may be motivated to marry because of strong emotions: she is in love, or he is frustrated with his parents' strict rules, or they want to have sex but believe that sex outside of marriage is sinful. Alternatively, the minor's partner or parent might be pushing for marriage and the minor may feel pressured to agree. In all of these situations, the adolescent's emotions and external pressures may hinder their ability to make a mature decision.<sup>280</sup>

However, the research also indicates that if the adolescent is permitted to consult with an adult who can help them think through the consequences of their decision, they may be able to make a mature decision.<sup>281</sup> It could be argued that the parental and judicial consent requirements ensure that the adolescent will receive such wise counsel, but there is ample evidence that this is not always the case. The parent may consent even if they believe the minor is not mature enough for marriage because they do not want the child to be angry or

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<sup>277</sup> *Id.* at 264.

<sup>278</sup> *Id.* at 263–64.

<sup>279</sup> *Id.* at 264.

<sup>280</sup> *Id.* at 263–64.

<sup>281</sup> Professor Hamilton views the issue differently. She argues that "[b]y ages fifteen or sixteen, adolescents have attained adult-like cognitive processing capacities" and "have the ability to make a rational decision whether to marry or not." Hamilton, *supra* note 7, at 1855. While she acknowledges that they are likely to overestimate the odds that the marriage will succeed long-term, she points out that adults exhibit the same belief "in the exceptionalism of one's impending union" and also vastly overestimate the odds that their marriage will last. *Id.* at 1855–56. Since adolescents' beliefs mirror those of adults, she concludes that this flawed thinking should not disqualify adolescents from consenting to marriage. *Id.* at 1856–57. However, while she concludes that adolescents are capable of consenting to marry, they lack the capacity to *sustain* modern marriage, which she argues requires "relationship skills," "emotional maturity", and well-developed individual identity, education or work experience that adolescents lack. *Id.* at 1860. I disagree that adolescents have decisional capacity equal to adults without the assistance of adults who can help them think through the consequences of their actions. Moreover, I believe that it is possible for some older adolescents to have the emotional maturity and skills necessary to sustain a marriage. The difficulty lies in identifying the exceptional adolescents and allowing them to marry while preventing those who are not sufficiently mature to marry.

run away,<sup>282</sup> or they might be pressuring or forcing the minor to marry for their own benefit or because of their personal or religious beliefs.<sup>283</sup>

Courts may defer to the parents and simply rubber-stamp their decision. A judge may also believe that marriage is in a minor's best interest because the judge is not aware of the dismal statistics related to early marriage. While it is not necessary for every judge or parent to try to dissuade a teen from marrying, in order for the adolescent to make a mature and informed decision, they need to hear accurate and comprehensive information. Unless mechanisms are in place to ensure that the adolescent is receiving this type of counseling—instead of uncritical parental or judicial approval—even older adolescents should not be allowed to marry because it is impossible to determine whether the minor is making an informed decision to marry, acting impulsively due to strong emotions or coercion, or simply deferring to the judgment of others.

Certainly, parents and judges may fill the role of counselor, and if the court confirms that the adolescent understands the consequences of marriage and is making a mature decision, then allowing the teen to marry may not violate the minor's constitutional rights. Since the constitutional objection is based on substituting parental or judicial consent for the minor's consent, if it is proven that the minor is making a knowing, informed choice, arguably that objection should no longer exist. While states could require counseling for all minors seeking to marry, unless the state provided the counseling free-of-cost, that requirement would disadvantage those who could not afford it. Moreover, most parents and judges lack the training and skills necessary to accurately assess the maturity level of a particular adolescent.<sup>284</sup> Even if they had the ability to make an accurate assessment, inquiring into the minor's maturity is time-consuming and may not be considered a good use of limited judicial resources, particularly if the alternative is simply to wait a few years until the minor reaches adulthood and can marry without court intervention.

Given the physical, emotional, and financial risks of early marriage<sup>285</sup> and the difficulty of assessing whether any individual adolescent is capable of giving informed consent to marriage, prohibiting marriage for at least some—and maybe all—older adolescents is advisable and is likely constitutional. The Su-

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<sup>282</sup> See *Porter v. Ark. Dep't of Health & Human Servs.*, 286 S.W.3d 686, 693 (Ark. 2008) (both parents testified that they consented to the marriage because they were afraid that if they refused, their daughter would "run off" and they would not hear from her again).

<sup>283</sup> See, e.g., *Robinson v. Commonwealth*, 212 S.W.3d 100, 102 (Ky. 2006); discussion *supra* Section III.A. In that case, the minor agreed to marry a much-older man in response to pressure from him and from her mother (who was also in a sexual relationship with the man she was to marry). She told a social worker that she agreed to the marriage because she feared they would leave her in Tennessee and return to Kentucky without her if she refused. *Robinson*, 212 S.W.3d at 102.

<sup>284</sup> See *TAHIRIH JUSTICE CTR.*, *supra* note 4 at 6 ("Judges often lack statutory guidance, training, and sensitivity to family violence and coercive control. And, they often have insufficient time or resources to explore such elements.").

<sup>285</sup> See discussion *supra* Part I.

preme Court has upheld restrictions on a minor's decision-making ability when the consequences are irreversible and potentially life-changing (as when the minor seeks an abortion), and it is likely that it will uphold restrictions that merely delay—not foreclose—a minor's ability to consent to marriage.<sup>286</sup>

## V. PROTECTING AND RESPECTING THE RIGHTS OF MINORS

Some older minors may be capable of giving informed consent to marriage, and a court could hold that denying an older and mature minor the right to marry violates the minor's fundamental rights. Consequently, it is worth considering how a state might determine whether a particular minor is sufficiently mature to consent to marry, and what regulations and procedures are necessary to protect the rights of immature minors who lack capacity to consent to marriage.

### A. *No Marriage of Young Children*

A child must be sufficiently mature to give informed consent to a marriage. This means that the child must understand the nature of marriage, the responsibilities and obligations that accompany marriage, and the legal and financial consequences of marriage. If the child is not mature enough to give that consent, marriage should not be allowed. Under the common law, only girls under the age of twelve and boys younger than fourteen lacked capacity to marry, and some states still follow the common law.<sup>287</sup> However, those thresholds are not supported by research or common sense. The common-sense conclusion is reflected by the fact that no state statute allows twelve-year-old girls to marry without parental or judicial approval.<sup>288</sup> In other words, the legislative bodies in every state consider twelve years old too young to consent to marriage.<sup>289</sup>

Research into adolescent brain development backs up and, perhaps, influences that common sense conclusion. Current research indicates that minors do not have decision-making capacity comparable to adults until later adolescence (fifteen or sixteen).<sup>290</sup> These findings support prohibiting marriage if either party is under the age of fifteen. Statutes in every state should clearly prohibit marriage of children under the age of fifteen, with no exceptions.

If a couple marries while a party is below the minimum age, or otherwise fails to comply with statutory requirements related to marriage involving a minor, that marriage should be declared void *ab initio* instead of voidable. This removes the incentive to lie about a minor's age in order to marry. It also re-

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<sup>286</sup> See Higdon, *supra* note 19, at 101 (quoting Zablocki v. Redhail, 434 U.S. 374, 386 (1978)) (noting that courts have upheld reasonable state marriage restrictions that “do not significantly interfere” with the right to marry).

<sup>287</sup> See State v. Sedlack, 787 P.2d 709, 711 (Kan. 1990).

<sup>288</sup> See TAHIRIH JUSTICE CTR., *supra* note 4 at 30–31 (summarizing state minimum marriage ages and exceptions).

<sup>289</sup> *Id.*

<sup>290</sup> See Steinberg, *supra* note 218, at 263; discussion *supra* Section IV.B.2.

moves the burden on the minor or the courts to declare the marriage void and ensures that the adult spouse will not avoid liability for statutory rape. This rule is also consistent with the fact that young children lack the maturity to give informed consent to marriage.<sup>291</sup> Thus, statutes also should be revised to make clear that no common law marriage is valid if either party is below the minimum statutory age for marriage.

### *B. Greater Responsibility and Guidance for Courts*

Before a court approves a minor's marriage, it must find that marriage is in the best interests of the child, and evidence supporting the finding should be identified. The inquiry must require more than simply asking the minor and parent if they think the marriage is a good idea. Instead, the court must require evidence of the minor's maturity level and ability to understand the responsibilities that accompany marriage, and must ensure that the minor is not being pressured into the marriage or marrying someone who is likely to be (or who has already been) abusive.

In 2016 the Commonwealth of Virginia amended its laws to make the minimum marriage age eighteen unless the minor has been emancipated by court order.<sup>292</sup> In order to be emancipated, the minor must be at least sixteen years old and must file a petition with the court.<sup>293</sup> "If the petition is based on the minor's desire to enter into a valid marriage, the petition shall also include the name, age, date of birth, if known, and residence of the intended spouse."<sup>294</sup> The criminal records (if any) of both intended spouses and any protective orders issued between them must be attached to the petition.<sup>295</sup> After a hearing, the court may enter an order declaring the minor emancipated only if it finds that "the minor desires to enter into a valid marriage" and additional statutory requirements are met,<sup>296</sup> including written findings that:

1. It is the minor's own will that the minor enter into marriage, and the minor is not being compelled against the minor's will by force, threats, persuasions, menace, or duress;
2. The individuals to be married are mature enough to make such a decision to marry;

<sup>291</sup> See discussion *supra* Part IV.

<sup>292</sup> VA. CODE ANN. § 20-48 (2018) ("The minimum age at which persons may marry shall be 18, unless a minor has been emancipated by court order.").

<sup>293</sup> VA. CODE ANN. § 16.1-331 (2018).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> VA. CODE ANN. § 16.1-333 (2018) (stating that a minor can also be emancipated if the court finds that: "(i) the minor has entered into a valid marriage, whether or not that marriage has been terminated by dissolution; (ii) the minor is on active duty with any of the armed forces of the United States of America; [or] (iii) the minor willingly lives separate and apart from his parents or guardian, with the consent or acquiescence of the parents or guardian, and that the minor is or is capable of supporting himself and competently managing his own financial affairs[.]").



3. The marriage will not endanger the safety of the minor. In making this finding, the court shall consider (i) the age difference between the parties intending to be married; (ii) whether either individual to be married has a criminal record containing any conviction of an act of violence . . . ; and (iii) any history of violence between the parties to be married; and
4. It is in the best interests of the minor petitioning for an order of emancipation that such order be entered.<sup>297</sup>

The evidence that must be submitted and the findings that the court is required to put in writing make clear that the court may not simply rubber stamp the decision of minors or their parents. It impresses upon judges their responsibility to protect minors from being pressured into a marriage or from entering into a marriage with someone who—based on past behavior—might be a threat to their physical health or emotional well-being. Notably, the court cannot rely solely on pregnancy as a sufficient reason to emancipate the minor and allow the marriage, nor can the wishes of the parents be determinative.<sup>298</sup> Finally, any minor who marries is also emancipated and, therefore, able to act (and, if necessary, live) independently of his or her spouse.

The Virginia approach also requires judges to seek information from a wider variety of sources.<sup>299</sup> Currently, some states only require one parent's consent to his or her child's marriage, yet the nonconsenting parent may have highly relevant information regarding whether the marriage is in the minor's best interest. That parent also may be better able and willing to support the child and her baby, if she is pregnant. While the approval of both parents may not be constitutionally required,<sup>300</sup> and the agreement of both parents should not be sufficient proof of the minor's maturity, if a parent is actively involved in the child's life and there is no evidence that their participation threatens the child in any way, their opinion should be sought, and their perspective considered. Moreover, it might be appropriate to seek input from others who are involved in the child's life and who may have some insight into whether the marriage is in the child's best interests. Teachers, coaches, and social workers are examples of adults who might have valuable information about the minor's maturity and ability to make mature decisions about the marriage and within the marriage.

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<sup>297</sup> VA. CODE ANN § 16.1-333.1 (2018).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* (detailing written findings necessary for emancipation of a minor who intends to marry, including whether either intended spouse has a conviction for an act of violence and whether there is a history of violence between the intended spouses). *See also* VA. CODE ANN § 16.1-332 (2018) (requiring the court to appoint guardian ad litem as counsel for the minor and authorizing the court to “require the local department of social services or any other agency or person to investigate the allegations in the petition and file a report of that investigation with the court”).

<sup>300</sup> *Kirkpatrick v. Eighth Judicial Dist. Court*, 64 P.3d 1056 (Nev. 2003) (holding that a state statute allowing one marriage of minor under the age of sixteen with the approval of only one parent does not violate the other parent's constitutional rights).

The Commonwealth of Kentucky amended its laws and raised the minimum marriage age to seventeen in 2018.<sup>301</sup> No one under the age of seventeen is allowed to marry under any circumstances, and seventeen-year-olds can only marry with parental consent and a court order removing the disability of minority and granting permission to marry.<sup>302</sup> Similar to the amended Virginia statute, the new Kentucky requirements for obtaining court approval are rather onerous and appear designed to ensure that judges consider the maturity and safety of the minor and inquire into the character of the intended spouse.<sup>303</sup> Additionally, the court “shall take reasonable measures to ensure that any representations made by a minor party are free of coercion, undue influence, or duress. Reasonable measures shall include, but are not limited to, *in camera* interviews.”<sup>304</sup>

The court must conduct an evidentiary hearing and will grant the petition for permission to marry *unless*:

- (a) The age difference between the parties is more than four (4) years;
- (b) The intended spouse was or is a person in a position of authority or a position of special trust . . . in relation to the minor;
- (c) The intended spouse has previously been enjoined by a domestic violence order or interpersonal protective order, regardless of whether or not the person to be protected by the order was the minor petitioner;
- (d) The intended spouse has been convicted of or entered into a diversion program for a criminal offense against a victim who is a minor . . . or for a violent or sexual criminal offense . . . ;
- (e) The court finds by a preponderance of the evidence that the minor was a victim and that the intended spouse was the perpetrator of a sexual offense against the minor . . . ;
- (f) The court finds by a preponderance of the evidence that abuse, coercion, undue influence, or duress is present; or
- (g) The court finds that it would otherwise not be in the minor party’s best interest to grant the petition to marry.<sup>305</sup>

The statute expressly prohibits finding that the marriage is in the best interest of the minor solely because of a past or current pregnancy.<sup>306</sup>

The Kentucky approach avoids some the constitutional pitfalls mentioned above. First, it can exclude sexual predators from those who may be permitted to marry a minor.<sup>307</sup> Paragraph (e) appears to disqualify parties if the intended spouse is guilty of statutory rape involving the minor.<sup>308</sup> One concern is that it

<sup>301</sup> S.B. 48, 2018 Gen. Assemb., Reg. Sess. (Ky. 2018) (amending KY. REV. STAT. §§ 402.020, 402.030, 402.080 and adding a new section describing the requirements for a court order emancipating the minor and granting the petition for permission to marry).

<sup>302</sup> *Id.*

<sup>303</sup> *See id.*

<sup>304</sup> *Id.* sec. 7(4).

<sup>305</sup> *Id.* sec. 7(5).

<sup>306</sup> *Id.* sec. 7(6).

<sup>307</sup> *Id.* sec 7(5)(e).

<sup>308</sup> *Id.*

is not clear that the court must determine whether the intended spouse was the perpetrator of a sexual offense against the minor. Consequently, if the parties do not mention any sexual contact between the minor and the intended spouse, and the court does not inquire, the parties may be allowed to marry even though the minor was a victim of statutory rape. In order to fully protect the rights of the minor, the court must inquire and ensure that the intended spouse is not guilty of statutory rape or other sexual offense.

### C. *Less Weight Should Be Given to Parental Consent*

The Virginia statute expressly states that the wishes of the minor's parents are not sufficient to establish that marriage is in the minor's best interest.<sup>309</sup> This provision is crucial because some judges and clerks—and even some statutes that require parental consent—assume that the parents are in the best position to determine whether marriage is in their child's best interests.<sup>310</sup> Consequently, if a parent consents, those judges or clerks may not conduct any independent inquiry and will simply echo the parent's decision.<sup>311</sup> However, that deference to parents is not always warranted. While “there is a presumption that fit parents act in the best interests of their children,”<sup>312</sup> parental consent statutes do not require a finding that the parent is “fit.”<sup>313</sup> Given the high stakes for the minor, it is unwise to assume that a parent is fit before giving any weight to their determination that marriage is in the child's best interest.<sup>314</sup>

In *Porter v. Arkansas Dep't of Health & Human Services* a sixteen-year-old girl, D.P., married thirty-four-year-old Ralph Rodriguez with the permission of both of her parents.<sup>315</sup> Less than two weeks later the parents appeared at a Family in Need of Services hearing initiated in response to the alleged truancy of D.P. and her twelve-year-old sister.<sup>316</sup> In addition to seeking emergency custody of D.P. and her siblings due to dependency-neglect, the state sought to

<sup>309</sup> VA. CODE ANN. § 16.1-333.1(4) (2018).

<sup>310</sup> See, e.g., ARK. CODE ANN. § 9-11-102 (2018) (allowing the county clerk to issue a marriage license to minors at least sixteen years old with proof of parental consent).

<sup>311</sup> *Id.*

<sup>312</sup> *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

<sup>313</sup> For instance, Arkansas allows sixteen and seventeen year olds to marry if they furnish the clerk with “satisfactory evidence consent of the parent or parents or guardian to the marriage.” ARK. CODE ANN. § 9-11-102(b)(1) (2018). “The consent of the parent may be voided by the order of a circuit court on a showing by clear and convincing evidence that: (i) The parent is not fit to make decisions concerning the child; and (ii) The marriage is not in the child's best interest.” *Id.* § 9-11-102(b)(2)(B). However, voiding the consent requires court action after consent has already been given, and there is no requirement that the clerk inquire into the parents or parents' fitness *before* the marriage license can be issued. See *id.*

<sup>314</sup> *Troxel*, 530 U.S. at 89 (Stevens, J., dissenting) (“The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.”).

<sup>315</sup> *Porter v. Ark. Dep't of Health & Human Servs.*, 286 S.W.3d 686, 689–90 (Ark. 2008).

<sup>316</sup> *Id.* at 689.

void D.P.'s marriage.<sup>317</sup> At the hearing, D.P.'s mother revealed that she thought D.P.'s husband was twenty-five (he was actually thirty-four).<sup>318</sup> Her father admitted that he "was generally unfamiliar with Rodriguez" and had not investigated or even inquired into his past.<sup>319</sup> At trial, there was evidence that the parents had allowed D.P. to date Rodriguez when she was only fifteen.<sup>320</sup> The DHS petition described Rodriguez as "a stranger from the internet."<sup>321</sup> Both parents testified that they consented to the marriage because they were afraid that if they refused, D.P. would "run off" and they would not hear from her again.<sup>322</sup>

Based in part on this evidence, the court granted the DHS petition for emergency custody and found that the parents were unable to provide supervision or "make decisions that protect and keep [the children] safe."<sup>323</sup> At a later adjudication hearing, the court determined that the children were dependent-neglected.<sup>324</sup> In addition, the court voided D.P.'s marriage to Rodriguez "on the basis that the parental consent was obtained through coercion and misrepresentation of Rodriguez's age and that D.P. lacked the mental capacity to enter into a contract of marriage."<sup>325</sup>

On appeal, D.P.'s father argued that the trial court violated his fundamental right to make decisions about the upbringing of his children when it removed his children from his custody solely because he consented to D.P.'s marriage.<sup>326</sup> The Supreme Court of Arkansas disagreed, finding that the court properly considered evidence that he and D.P.'s mother consented to the marriage without investigating Rodriguez, as well as evidence that the parents had allowed D.P. to date Rodriguez when she was only fifteen years old, that they had engaged in an inappropriate sexual relationship, and had posted "sexually exploitative pictures on the internet."<sup>327</sup>

Despite finding that D.P. was neglected based in part on the parents' consent to her marriage, the Arkansas Supreme Court held that trial court erred in voiding the marriage.<sup>328</sup> Although both parents believed Rodriguez to be in his twenties when they consented to the marriage, neither testified that their belief was based on representations by D.P. or Rodriguez.<sup>329</sup> Moreover, her father

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 690.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 693.

<sup>321</sup> *Id.* at 690.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 691.

<sup>326</sup> *Id.* at 692 (stating that the father's argument cited the Fourteenth Amendment Due Process Clause).

<sup>327</sup> *Id.* at 693.

<sup>328</sup> *Id.* at 696.

<sup>329</sup> *Id.* at 695.

admitted that when he met Rodriguez, he looked over thirty and her mother admitted that she allowed D.P. to date a thirty-four-year-old man.<sup>330</sup> The court concluded that the evidence demonstrated “extreme carelessness on the part of the parents in supervising D.P.” but did not establish misrepresentation necessary to void the marriage.<sup>331</sup>

Moreover, Arkansas law did not allow the courts to annul a marriage because the marriage was not in D.P.’s best interests and was “incompatible with the goal” of reuniting D.P. with her father.<sup>332</sup> Finally, while there was evidence that D.P. was immature and unfit to make decisions at the time of the trial, there was no evidence that she lacked capacity to enter into a marriage contract at the time of the marriage.<sup>333</sup> Consequently, the trial judge erred in voiding the marriage, that judgment was reversed, and the marriage remained valid.<sup>334</sup>

The findings in *Porter* demonstrate the danger inherent in relying solely on parents’ judgments when allowing a minor to marry. If the parents (or parent in states that only require the consent of one parent) are neglectful or abusive, their consent provides no assurance that the marriage is in the minor’s best interests or that the minor is not being forced or coerced. Equally disturbing, even if the state later learns that the parents’ judgment is untrustworthy or that the marriage was improvident, the marriage remains valid unless there are other grounds for voiding the marriage.<sup>335</sup>

#### *D. Information Necessary for Informed Consent*

Even if a minor is sufficiently mature to consent to marriage, maturity does not equal knowledge. In order for consent to be truly informed, potential minor brides and grooms must have a realistic understanding of the challenges they will face if married, as well as the options available if they choose not to marry. The minor should be interviewed and informed of available resources outside of the presence of parents and the intended spouse who might attempt to pressure or coerce the minor. Counseling should be available, perhaps mandatory. For example, a pregnant minor might not know of resources available to support her if she chooses to raise the child as a single mother (including child support from the father), or the availability of adoption or abortion providers if she chooses not to raise the child. This information is especially necessary if the parents are threatening to withdraw financial support if the child does not marry.

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<sup>330</sup> *Id.*

<sup>331</sup> *Id.* The court noted that a marriage could only be annulled on grounds identified by statute. *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 696.

<sup>334</sup> *Id.*

<sup>335</sup> *See id.* at 695.

*E. The Limits of the Law*

It is important to acknowledge that views regarding the proper role of girls and women in society vary widely. While many (perhaps the majority) of men and women accept that girls should have the same opportunities as boys, and believe that a woman should become a wife and/or mother only if and when she chooses to do so, there are still those who believe that a woman only fulfills her purpose in life by becoming a wife and mother.<sup>336</sup> In that context, marrying early may not be viewed as depriving the girl of anything valuable.

It is also clear that the opportunity for higher education and increased income potential does not exist equally in all communities. In poor and rural areas of America, a young girl may not believe that her prospects will be any better at twenty-one than they are at fourteen.<sup>337</sup> “In places where those opportunities seem more like fantasies, there is less reason to wait for marriage; indeed, marriage and child-rearing may be the things that seem most appealing and rewarding to poor girls without other opportunities.”<sup>338</sup> Poverty also correlates with a lack of access to contraception and higher teen pregnancy rates.<sup>339</sup> In this context, marriage is the solution to the problem of “sinful” premarital sex and out-of-wedlock pregnancy.<sup>340</sup>

Moreover, while out-of-wedlock births are generally accepted in modern American society, there are still many individuals and communities that view an unwed pregnant girl as bringing shame on herself and her family.<sup>341</sup> Finally, many pro-life advocates view abortion as murder and believe that it is better for a very young pregnant girl to marry than to terminate the pregnancy.<sup>342</sup> Even if a young girl lives in a community that would not judge her harshly for being unwed and pregnant, or that would disapprove of marriage at a young age, if the girl’s family or guardian support or pressure her to marry at a young age,

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<sup>336</sup> SYRETT, *supra* note 24, at 254 (stating that “evangelical Christians tend to emphasize wife- and motherhood as the fulfillment of a woman’s destiny”).

<sup>337</sup> *Id.* at 253.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 254.

<sup>341</sup> Sean Langille, *New Hampshire Lawmakers Reject Bill Raising Marriage Age From 13*, WASH. EXAMINER (Mar. 10, 2017, 12:34 PM), <https://www.washingtonexaminer.com/new-hampshire-lawmakers-reject-bill-raising-marriage-age-from-13/article/2617034> [<https://perma.cc/HT5Q-5Y3D>] (stating that Senator Bates, a state representative in New Hampshire, opposed legislation to raise the minimum marriage age in part because it would result in more out-of-wedlock births); Kate Walker, *My Teenage Daughter Is Pregnant—I Feel So Ashamed*, GUARDIAN (Oct. 21, 2011 7:05 PM), <https://www.theguardian.com/lifeandstyle/2011/oct/22/teenage-pregnancy-shame-mother-daughter> (describing mother’s shame on learning of her daughter’s teen pregnancy and grandfather’s feeling that granddaughter should marry her baby’s father to “to bring less shame on the family”).

<sup>342</sup> See Tsui, *supra* note 222 (noting anti-abortion group’s opposition to raising minimum marriage age because of concerns that pregnant girls would be pressured to get abortions if they could not marry).

she may face being disowned or ostracized from her only support system if she refuses to marry.

Children in such families or communities are not fully protected by laws banning underage marriage. Children are completely dependent upon the adults in their lives for their necessities. If a young girl's family is unwilling to support her if she chooses not to marry or seeks to terminate a pregnancy, her life may still be permanently altered. If her parents or guardians fail or refuse to protect her from predatory older men or support her if she is raped, then remaining unwed does not solve her problem or make her less vulnerable to abuse. Consequently, a discussion about underage marriage must also consider the broader social context in which such marriages are allowed or encouraged. Banning child marriages removes only one (very important) piece of the larger puzzle. Deterring would-be rapists must be a primary goal. Ensuring a quality education and meaningful employment opportunities for boys and girls in low-income and rural communities would also provide powerful incentives to delay marriage and childrearing.

#### CONCLUSION

Even well-meaning adults cannot be allowed to deprive minors of their constitutional rights. Given the evidence of the high likelihood of physical, emotional, and financial damage associated with early marriage, there is ample incentive to prevent these marriages when the minor is unable to give informed consent. While some minors may suffer stigma and social isolation if they are unable to marry and "cure" perceived sinful conduct, the "cure" is often ineffective in the long term since the vast majority of early marriages end in divorce, often accompanied by poverty. Instead, the focus should be on providing support that will allow minors to reach adulthood healthy and able to choose a path that will lead to happiness and prosperity on their own terms.