

CHILD MARRIAGE IN AMERICA: AN INTERIM SOLUTION PENDING A TOTAL BAN

Raquel Wildes Genet[†]

“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness.”¹

TABLE OF CONTENTS

INTRODUCTION	3000
I. BACKGROUND.....	3004
A. <i>The Problem with Child Marriage</i>	3004
B. <i>Advocates Seeking Reform Face Challenges</i>	3007
C. <i>Historical and Legal Overview</i>	3011
1. The Significance of Eighteen	3013
2. Applying for a Marriage License	3013
3. The Role of Parents	3015
4. Judicial Consent	3017
5. Recognition of the Marriage in Other States	3020

[†] Note Editor, *Cardozo Law Review*. J.D., Benjamin N. Cardozo School of Law, 2019; M.S., Columbia Journalism School, 2016; B.A., Columbia University, 2015. This Note owes much to the guidance of Professors Marci Hamilton and Edward Stein. Thank you for your thoughtful feedback and for being so generous with your time. A special thank you to the editors of the *Cardozo Law Review*, past and present, and to my Note editor, Jessica Goudreault. To my parents, Amy and Michael, thank you for your constant support. I am forever grateful for your love and guidance. To Monica and David, thank you for encouraging me to pursue my dreams. And finally, to my husband, Aryeh, who I married while writing this Note, thank you for your unwavering loyalty and for making me smile every day.

¹ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

6. Getting Out of the Marriage.....	3022
II. ARGUMENTS FOR AND AGAINST A TOTAL BAN OF CHILD MARRIAGE.....	3022
A. <i>The Legal Status of Children</i>	3023
B. <i>A Child's Alleged Constitutional Right to Marriage</i>	3025
C. <i>Balancing the Child's Desire to Marry with Parental Rights</i>	3026
D. <i>Infringement on Religious Liberty</i>	3028
E. <i>Statutory Consistency</i>	3030
F. <i>"A Discomfort for Blanket Rules"</i>	3032
III. EIGHTEEN WITH EXCEPTION: AN INTERIM SOLUTION.....	3033
A. <i>Setting the Age Floor at Seventeen</i>	3033
B. <i>Implementation Among the States</i>	3035
C. <i>Procedural Protections</i>	3036
1. <i>Judicial Consent and Training</i>	3036
2. <i>Parental Consent</i>	3037
3. <i>Parties to the Marriage</i>	3038
4. <i>Mandatory Waiting Periods and Residency Requirements</i>	3038
5. <i>Child Brides Should be Granted a Full Set of Adult Legal Rights</i>	3039
6. <i>A Shrinking Age Gap</i>	3040
IV. COUNTERARGUMENTS	3041
A. <i>The Total Ban Should Go into Effect Now</i>	3041
B. <i>Girls Younger than Seventeen Should Be Able to Marry</i>	3042
C. <i>Religious Liberty Sentiment</i>	3042
D. <i>The Procedural Protections Are Costly</i>	3043
CONCLUSION.....	3044
APPENDIX.....	3045

INTRODUCTION

As an institution integral to family life, the state has always played a regulatory role in marriage.² But, until recently, a glaring legal issue has

² *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (“[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress.”); C.J. Leah

been missing from the conversation surrounding marriage in the United States: our child marriage problem. Americans have many misconceptions about child marriage.³ We tend to think of child marriage as happening in foreign, developing countries or among isolated or immigrant communities, but recent reports show that the practice is pervasive throughout America's borders.⁴ "Loopholes" in state marriage laws have enabled children to marry in our own backyards.⁵

Between 2000 and 2015, at least 207,459 minors were married in the United States.⁶ Approximately ninety percent of minors who married were female—mostly sixteen- or seventeen-years-old.⁷ On occasion, however, children as young as ten, eleven, and twelve were granted marriage licenses in Alaska, Louisiana, South Carolina, and Tennessee.⁸ Only some of these marriages involved two minors.⁹ A vast majority of the time, a minor's spouse was eighteen, nineteen, or in his early twenties, but around 500 minors were permitted to marry partners

Ward Sears, *The "Marriage Gap": A Case for Strengthening Marriage in the 21st Century*, 82 N.Y.U. L. REV. 1243 ("[T]he health of the institution of marriage is directly related to the health of our children and communities."); NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 1–2 (Harvard Univ. Press 2002).

³ For the purpose of this Note, child marriage will be defined as any marriage to which a party is under eighteen years old.

⁴ See, e.g., Anjali Tsui, Dan Nolan & Chris Amico, *Child Marriage in America: By the Numbers*, FRONTLINE (July 6, 2017), <http://apps.frontline.org/child-marriage-by-the-numbers> [<https://perma.cc/E9T9-3QY4>]; TAHIRIH JUSTICE CTR., *FALLING THROUGH THE CRACKS: HOW LAWS ALLOW CHILD MARRIAGE TO HAPPEN IN TODAY'S AMERICA* (2017), <https://www.tahirih.org/wp-content/uploads/2017/08/TahirihChildMarriageReport-1.pdf> [<https://perma.cc/95BR-7RVK>] [hereinafter TAHIRIH JUSTICE CTR. REPORT].

⁵ See, e.g., Melissa Jeltsen, *Grown Men Are Exploiting Loopholes in State Laws to Marry Children*, HUFFPOST (Aug. 30, 2017, 12:01 AM), https://www.huffpost.com/entry/child-marriage-state-laws_n_59a5e70ee4b00795c2a27e19 [<https://perma.cc/QCR7-HMYJ>]; Jasmine Garsd, *Child Brides Are a Little-Known, but Very Real, Problem in America Today*, PUB. RADIO INT'L (Mar. 17, 2017, 7:30 PM), <https://www.pri.org/stories/2017-03-17/child-brides-are-little-known-problem-america-today> [<https://perma.cc/E8YJ-P5WP>].

⁶ Tsui, *supra* note 4 (analyzing marriage records from forty-one states and the largest counties in Arizona, Nevada, and New Mexico, conducting one of the most comprehensive surveys to date).

⁷ *Id.* Because a majority of child marriages in the United States involve a minor girl, female pronouns will be used throughout this Note.

⁸ *Id.*

⁹ *Id.*

in their forties, fifties, and sixties.¹⁰ As the law stands in about half of the states, a child bride can wed at almost any age so long as she has a parent's consent.¹¹

While it is true that the number of child marriages has, overall, dropped, child marriage still persists across the United States—especially among rural, low-income populations,¹² like in Idaho, where 84 out of every 10,000 marriages over the past fifteen years included a child.¹³ Idaho is one of eighteen states that do not set an age floor for marriage.¹⁴ In those states, a child can be married at any age if the statutory exceptions are met.¹⁵ Currently, the minimum age at which one could legally marry without exception is highest (at eighteen) in only two states: Delaware and New Jersey.¹⁶ Six states follow with no marriage permitted for individuals under seventeen.¹⁷ In those states, there are no circumstances that would permit anyone under the age of seventeen to wed.¹⁸ But those types of statutes have not been adopted across the nation.¹⁹ For example, a 1907 New Hampshire law permitting a thirteen-year-old girl to marry with parental consent was on the books

¹⁰ *Id.*

¹¹ These states include: Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Washington, West Virginia, and Wyoming. See TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 32–34 (appendices); see also *Current Laws for Child Protection*, CHILD USA, <https://www.childusa.org/law> [<https://perma.cc/B73R-VCJP>] (last visited Apr. 29, 2019) (clicking on each state to view its age of marriage).

¹² NICHOLAS L. SYRETT, *AMERICAN CHILD BRIDE: A HISTORY OF MINORS AND MARRIAGE IN THE UNITED STATES* 252–65 (2016).

¹³ Tsui, *supra* note 4.

¹⁴ IDAHO CODE ANN. § 32-202 (West 2016); TAHIRIH JUSTICE CTR., UNDERSTANDING STATE STATUTES ON MINIMUM MARRIAGE AGE AND EXCEPTIONS 13, <https://www.tahirih.org/wp-content/uploads/2016/11/FINAL-Oct-2018-State-Statutory-Compilation.pdf> [<https://perma.cc/AQR7-4CAZ>] (last updated Oct. 11, 2018) [hereinafter *Comprehensive Nonage Statutes Chart*].

¹⁵ *Comprehensive Nonage Statutes Chart*, *supra* note 14.

¹⁶ *Id.*

¹⁷ *Id.* at 2. These states include Florida, Kentucky, Nebraska, New York, Oregon, and Tennessee.

¹⁸ *Id.*

¹⁹ *Id.*

until June 2018; now children must be sixteen in New Hampshire before they can legally wed.²⁰

Domestic child marriage is an ongoing problem that demands—and is finally receiving—media and political attention.²¹ The U.S. State Department considers forced child marriage a “human rights abuse”²² and has condemned the practice on personal and societal grounds.²³ International treaties expressly outlaw child marriage.²⁴ The United States has dedicated millions of dollars to combating child marriage abroad through the United States Agency for International Development,²⁵ but domestic child marriage has not received the same attention.²⁶ The time has come to turn public sentiment and our resources homeward.

²⁰ N.H. REV. STAT. ANN. §§ 457:4 (noting that the minimum marriageable age of girls is now sixteen), 457:6 (2019) (granting permission for girls between the ages of sixteen and eighteen to marry with parental consent); Jason Claffey, *NH Raises Marriage Age to 16 from 13 After Girl Scout's Plea*, PATCH, <https://patch.com/new-hampshire/nashua/nh-raises-marriage-age-16-after-girl-scouts-plea> [<https://perma.cc/ZG76-75Z6>] (last updated June 19, 2018, 10:15 AM).

²¹ See, e.g., *Advocates Work to End Child Marriage in the U.S.*, NPR (June 11, 2017, 8:12 AM), <https://www.npr.org/2017/06/11/532457876/advocates-work-to-end-child-marriage-in-the-u-s> [<https://perma.cc/JTB4-B5G4>]; Alison Thoet, *Activists in N.J. Push to Ban Child Marriage Before Christie Leaves Office*, PBS NEWS HOUR (June 6, 2017, 2:29 PM), <https://www.pbs.org/newshour/nation/activists-in-n-j-push-to-ban-child-marriage-before-christie-leaves-office> [<https://perma.cc/2ZAF-5Q7D>].

²² U.S. OF AM. DEP'T OF STATE ET AL., UNITED STATES GLOBAL STRATEGY TO EMPOWER ADOLESCENT GIRLS 5 (2016), <https://2009-2017.state.gov/documents/organization/254904.pdf> [<https://perma.cc/3Q22-87R7>].

²³ Anjali Tsui, *Married Young: The Fight over Child Marriage in America*, PBS (Sept. 14, 2017), <https://www.pbs.org/wgbh/frontline/article/married-young-the-fight-over-child-marriage-in-america> [<https://perma.cc/BXT8-B7AM>] (“The State Department considers formal and informal unions where at least one person is under the age of 18 a ‘harmful practice with negative health, education and economic repercussions for girls, families and communities,’ according to a spokesperson.”).

²⁴ See Camellia Burris, Comment, *Why Domestic Institutions Are Failing Child Brides: A Comparative Analysis of India's and the United States' Legal Approaches to the Institution of Child Marriage*, 23 TUL. J. INT'L & COMP. L. 151, 154–58 (2014).

²⁵ See *Preventing and Responding to Child, Early and Forced Marriage*, USAID, <https://www.usaid.gov/what-we-do/gender-equality-and-womens-empowerment/child-marriage> [<https://perma.cc/5M33-SEHY>] (last updated Nov. 18, 2015) (“In Fiscal Year 2015, USAID doubled our investment to \$10 million to prevent CEFM and meet the needs of married children around the world.”).

²⁶ Burris, *supra* note 24, at 165.

This Note explores child marriage in the United States. Part I considers the scope of child marriage and provides legal and historical background on marital age restrictions (also known as nonage statutes).²⁷ Part II considers arguments for and against a total ban of child marriage that would create a blanket eighteen-plus-to-marry age requirement in states. Part III concludes that a total ban is not yet a perfect fit for all states. Instead, it argues that no marriage should be permitted when a party is under seventeen, with increasing flexibility and deference to the parties as the child ages so long as there are effective procedural mechanisms in place to ensure that a seventeen-year-old seeking to marry is doing so of her own volition and that the marriage is in her best interest. Part IV addresses possible counterarguments to this Note's proposal. Ultimately, this Note concludes that the statutory scheme controlling marital age—though broken—is not beyond repair.

I. BACKGROUND

A. *The Problem with Child Marriage*

Marriage before eighteen is detrimental for both minors who become premature spouses²⁸ and for children who are products of a

²⁷ There are some challenges to this line of research worth noting at the outset: child marriage is often underreported; incidents in juvenile court are protected; parents who arrange the marriage of their child are not likely to file suit; children often do not know how to get the court involved in their personal affairs; some states do not record the age at which individuals apply for marriage licenses; and each state's marriage law is quite nuanced with different exceptions and backdoors. Despite these challenges, journalists, advocates, academics, and lawmakers finally have a clearer picture of the child marriage landscape in the United States. See TAHIRIH JUSTICE CTR. REPORT, *supra* note 4.

²⁸ See, e.g., Marnie Eisenstadt, *They Can't Drive or Buy a Beer, but in New York 14-Year-Olds Can Get Married*, SYRACUSE.COM (Mar. 23, 2017), https://www.syracuse.com/news/2017/03/they_cant_drive_or_buy_a_beer_but_in_new_york_14-year-olds_can_get_married.html [<https://perma.cc/WFM8-K4WS>] ("Data shows that getting married at a young age sets teens up to fail on many fronts."); see also Heather Barr, *Afghanistan Has a Tougher Law on Child Marriage than Florida*, HUMAN RTS. WATCH (Oct. 20, 2017, 6:40 AM), <https://www.hrw.org/news/2017/10/20/afghanistan-has-tougher-law-child-marriage-florida> [<https://perma.cc/79NV-A97M>]; Peter Schorsch, *Tahirih Justice Center Thanks Lawmakers for Bills Banning Child Marriage*, FLA. POL. (Oct. 17, 2017), <http://floridapolitics.com/archives/247196-tahirih-justice->

marriage involving a minor.²⁹ Studies show that youth who marry before their eighteenth birthday are less likely to finish high school,³⁰ less likely to attend college and become productive citizens,³¹ more likely to experience abuse or domestic violence,³² more likely to develop a mental illness,³³ and more likely to live in poverty.³⁴ Moreover, the maternal death rate is higher among young girls whose bodies are not physically prepared for childbirth and motherhood.³⁵

Children born of premature marriages are also disadvantaged.³⁶ Studies show that child marriages are more likely to end in divorce than marriages entered into by adults, creating unstable homes for the next generation.³⁷ Given the high divorce rate among youthful marriages,

center-thanks-lawmakers-bills-banning-child-marriage [https://perma.cc/Y3TJ-X258] (“Allowing children to marry robs them of a childhood and forces them into mature situations for which they are not physically, emotionally, or financially prepared.”) (internal quotations omitted).

²⁹ 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, 358 (2017) (“Another host of problems arise with the children of teenage brides. Children of teenage mothers have lower birth weights and higher rates of infant homicide, child abuse and neglect, academic and behavioral problems in school, and a greater likelihood of engaging in criminal activity.”).

³⁰ See generally Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817 (2012); Gary R. Lee, *Age at Marriage and Marital Satisfaction: A Multivariate Analysis with Implications for Marital Stability*, 39 J. MARRIAGE & FAM. 493 (1977); Larry L. Bumpuss & James A. Sweet, *Differentials in Marital Instability: 1970*, 37 AM. SOC. REV. 754, 757 (1972).

³¹ Hamilton, *supra* note 30; see also Bumpuss & Sweet, *supra* note 30.

³² Yann Le Strat et al., *Child Marriage in the United States and Its Association with Mental Health in Women*, 128 PEDIATRICS 524 (2011), <https://pediatrics.aappublications.org/content/pediatrics/early/2011/08/24/peds.2011-0961.full.pdf> [https://perma.cc/2YL9-JNN9].

³³ *Id.*

³⁴ Hamilton, *supra* note 30, at 1820. Note that the causal arrows go in multiple directions; it is possible that those who suffer from poverty, mental illness, and other unfortunate circumstances are more likely to get married or pregnant young as opposed to the other way around. It is often difficult to draw the line between causation and correlation when it comes to survey studies.

³⁵ Burris, *supra* note 24, at 152.

³⁶ See *supra* note 29.

³⁷ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 4 (“Between 70% and 80% of marriages involving individuals under age 18 end in divorce. For teen mothers, getting married and later divorcing can more than double their likelihood of poverty.”); see also JUDITH AREEN ET AL., *FAMILY LAW: CASES AND MATERIALS* 79 (6th ed. 2012); Anjani Chandra et al., *Fertility, Family*

some states require premarital counseling before a minor may marry,³⁸ but premarital counseling programs have not been proven effective.³⁹ Child marriage thus puts both a social and financial burden on the state in the form of increased healthcare and social services costs.⁴⁰

Legally sanctioned child marriage is also problematic because it enables the state to become complicit in the statutory rape⁴¹ of young girls where statutes governing age restrictions on marriage and statutory rape do not align.⁴² For example, in Arkansas, a pregnant child can be married off with the consent of a parent and/or judge at *any* age,⁴³ but girls cannot have consensual sex with anyone their age or older until

Planning, and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth, 23 VITAL HEALTH & STAT. 25, 90 (2005).

³⁸ ARIZ. REV. STAT. ANN. § 25-102 (2019) (requires both parties to undergo counseling if one party is under sixteen before a court can approve the marriage); CAL. FAM. CODE § 304 (West 2019) (authorizes the courts to order premarital counseling for all couples in which one of the parties is under eighteen); UTAH CODE ANN. §§ 30-1-30–39 (West 2019) (authorizes the county commissioner to require counseling for couples in which one partner is either under nineteen or divorced).

³⁹ Wesley J. Adams, *Marriage of Minors: Unsuccessful Attempt to Help Them*, 3 FAM. L. Q. 13 (1969) (finding an Iowa premarital counseling program unsuccessful at strengthening child marriages); see Meyer Elkin, *Premarital Counseling for Minors: The Los Angeles Experience*, 26 FAM. COORDINATOR 429, 442 (1977).

⁴⁰ Hamilton, *supra* note 30, at 1861 (“Public support of marriage is costly. State and federal government subsidize marital families, which receive billions of dollars annually in direct and indirect benefits.”).

⁴¹ Sex with children is a strict liability offense that is criminalized under the assumption that childhood substitutes for both force and lack of consent. Legally, children are deemed incapable of consenting to sex because they are too young and immature to realize the gravity of the act, and because children are prone to cooperate with adults when asked. Age discrepancy thus becomes a proxy for inequality of power and for force. Consent laws have evolved to make it harder to have sex with kids, but age restrictions on marriage laws have remained, for the most part, untouched. For more information, see CATHARINE A. MACKINNON, *SEX EQUALITY* 804, 809, 817 (2d ed. 2007); see also Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 367–69 (1995) (cataloging marital rape exemption statutes by state).

⁴² TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 12 (“[T]he laws governing the minimum age of consent to sex and the minimum marriage age are strikingly inconsistent and suggest . . . that at least some of the underage marriages being approved by clerks and judges are between rapists and their victims. Civil judges hearing underage marriage petitions are put in the position of turning a blind eye to criminal offenses otherwise considered so serious that they can subject the perpetrator to many years in jail and mandatory registration as a sex offender.”).

⁴³ See ARK. CODE ANN. § 9-11-103 (West 2008).

they turn sixteen.⁴⁴ Allowing such a marriage to go forward transforms illicit sex (in the form of statutory rape) to legal sex between the child bride and her husband/would-be rapist.⁴⁵ This is particularly troubling because a child who is legally unable to consent to sexual intercourse should, for the very same reasons, also be considered too immature to consent to marriage.⁴⁶

B. *Advocates Seeking Reform Face Challenges*

While marital age restrictions have been on the books for quite some time, there has only recently been a grassroots effort to lobby local governments to enact new marriage legislation.⁴⁷ These crusaders are working to uproot decades' old state laws regarding age restrictions on marriage.⁴⁸ And they have enjoyed some success. Over the course of this writing, Delaware and New Jersey completely banned child marriage,⁴⁹ and Florida and New York raised their minimum marital age to

⁴⁴ See ARK. CODE ANN. §§ 5-14-125–127 (West 2018).

⁴⁵ See, e.g., *State v. Bradley*, 889 P.2d 1167 (Mont. 1995) (holding that a twenty-nine-year-old husband cannot be convicted of the statutory rape of his fourteen-year-old underage wife); see also Kelly C. Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 255 (1997) (“The failure to charge those who engage in acts of statutory rape merely because they marry their child lover persists, despite the strict liability status of the crime.”).

⁴⁶ See Jackson, *supra* note 29, at 386. In Maryland, between 2000 and 2014, at least 69 of the state’s 3,100 child marriages involved pregnant teens marrying spouses who had committed statutory rape. See Tsui, *supra* note 4. Thus, a girl with whom sexual intercourse is a strict liability crime is capable of entering a marriage with an individual who would be her *ipso facto* rapist. See Jackson, *supra* note 29, at 380 (“By defining a girl of a certain age as both young enough to be a victim of statutory rape and old enough to enter into marriage with third-party consent, the states have created a contradictory legal scheme.”).

⁴⁷ *Child Marriage – Progress*, UNCHAINED AT LAST, <http://www.unchainedatlast.org/child-marriage-progress> [<https://perma.cc/2BFW-5U66>] (last visited Apr. 29, 2019) (“Unchained started the national movement to end child marriage . . . [and] has continued to keep a spotlight on the issue, with regular news media stories, Chain-Ins (political protests), email campaigns and presentations . . . work[ing] with allies in several states to introduce bills to end child marriage. Thanks to these efforts, Unchained and its growing group of allies have seen progress in the push to end child marriage in America . . .”).

⁴⁸ Tsui, *supra* note 4.

⁴⁹ DEL. CODE ANN. tit. 13, § 123 (West 2018) (“No individual under the age of 18 shall be granted a marriage license.”); N.J. STAT. ANN. § 37:1-6 (West 2019) (“A marriage or civil union license shall not be issued to a minor under the age of 18 years.”).

seventeen.⁵⁰ A total ban bill was passed by both Ohio's Senate and House and is now awaiting approval by the governor.⁵¹ Wyoming also introduced total ban legislation in its state legislature.⁵² Texas recently amended its marriage law prohibiting anyone under the age of sixteen from applying for a marriage license.⁵³

Despite progress, there have been setbacks. After all, lobbyists have only introduced successful total bans in two of the fifty states. The New Hampshire reform,⁵⁴ which was crafted by a seventeen-year-old Girl Scout, was critiqued by then-Representative David Bates who alluded to the fact that she is too young to craft legislative reform.⁵⁵ Ironically,

⁵⁰ N.Y. DOM. REL. LAW § 15-a (McKinney 2018) (marriages of minors under seventeen years of age); FLA. STAT. ANN. § 741.04 (West 2018); *see also* Comprehensive Nonage Statutes Chart, *supra* note 14; *see also* Kirstan Conley, *New York Marriage Age Set to be Raised to 17*, N.Y. POST (June 8, 2017, 10:09 PM), <https://nypost.com/2017/06/08/new-york-marriage-age-set-to-be-raised-to-17> [<https://perma.cc/4HQE-C4CL>]; Anjali Tsui, *Florida Moves to Ban Marriage Before the Age of 17*, PBS: FRONTLINE (Mar. 9, 2018), <https://www.pbs.org/wgbh/frontline/article/florida-moves-to-ban-marriage-before-the-age-of-17> [<https://perma.cc/H3FB-VFML>]. Before the amendment, pregnant girls in Florida could get married at any age so long as they had judicial consent. *See* FLA. STAT. ANN. § 741.0405 (West 1997).

⁵¹ S.B. 198, 132d Gen. Assemb., Reg. Sess. (Ohio 2017). H.B. 511, 132d Gen. Assemb., Reg. Sess. (Ohio 2018); *see also* Jessie Balmert, *Ohio Raises Minimum Age to Marry and Bans Child Marriages*, CINCINNATI ENQUIRER, <https://www.cincinnati.com/story/news/politics/2019/01/02/ohio-ban-child-marriage-eliminate-double-standard-young-brides/2462266002> [<https://perma.cc/22JB-29M9>] (last updated Jan. 7, 2019, 7:19 PM); Laura A. Bischoff, *Newspaper Series Led to Ohio Senate Bill on Child Marriage*, DAYTON DAILY NEWS, <https://www.daytondailynews.com/news/newspaper-series-led-ohio-senate-bill-child-marriage/icQAI20A5FZ8ut5b90i00L> [<https://perma.cc/AAB8-KNGE>] (last updated Sept. 20, 2017) (“The Daily News investigation found that between 2000 and 2015, 4,443 girls age 17 or younger were married, including 59 who were 15 or younger. In one case, a Gallia County judge allowed a 14-year-old pregnant girl to marry a 48-year-old man in 2002.”).

⁵² H.B. 60, 65th Leg. (Wyo. 2019); *see also* Ramsey Scott, *Wyoming Could Become Third State to Ban Child Marriage*, WYO. TRIB. EAGLE (Jan. 2, 2019), https://www.wyomingnews.com/news/local_news/article_95ca3404-0e50-11e9-a809-7be98a1bae44.html [<https://perma.cc/25D6-MEQK>].

⁵³ TEX. FAM. CODE ANN. § 2.003 (West 2017); *see also* Alex Samuels, *New State Law Seeks to Reduce the Number of Child Brides in Texas*, TEX. TRIB. (Sept. 26, 2017, 12:00 AM), <https://www.texastribune.org/2017/09/26/new-law-seeks-reduce-number-child-brides-texas> [<https://perma.cc/E6KY-UN5S>].

⁵⁴ *See* H.B. 499, Leg. 2017 Sess. (N.H. 2017).

⁵⁵ *See* Beth Germano, *NH Girl Scout Fights to Raise Legal Marriage Age to 18*, BOSTON CBS LOC. (Mar. 9, 2017, 5:39 PM), <https://boston.cbslocal.com/2017/03/09/girl-scout-fights-to-change-law-allowing-13-year-olds-to-marry-in-nh> [<https://perma.cc/B7CN-G3K7>] (“[S]ponsors of the bill say in the last five years two 15-year-old girls have married and one girl

however, in New Hampshire, she was old enough to wed.⁵⁶ Even the Texas bill passage is not a cause célèbre to Fraidy Reiss—an advocate, the founder of Unchained at Last,⁵⁷ and the product of a forced marriage herself⁵⁸—because *emancipated* teens can still wed.⁵⁹ This, Reiss argues, enables parents to force the emancipation of their children, paving a legal avenue for parents to marry off their child.⁶⁰ People like Reiss, whose family arranged for her to marry an abusive man when she was just nineteen, are trying to help women and girls leave forced marriages.⁶¹

Advocates face unique challenges when dealing with child brides.⁶² An adult can more easily escape her husband and seek help from an

as young as 13.”); Dave Solomon, *NH House Roundup: Bill to Ban ‘Child Marriage’ Fails in House*, N.H. UNION LEADER (Mar. 10, 2017), https://www.unionleader.com/news/politics/state/nh-house-roundup-bill-to-ban-child-marriage-fails-in-house/article_c45c60bf-c003-5c5f-9d6b-fdf5e05b23c2.html [<https://perma.cc/BXD8-T9YS>] (“Rep. David Bates, R-Windham, argued that the bill would have unintended consequences, particularly on military couples, and would increase the number of children born out of wedlock.”); Ashley Belanger, *Cassandra Levesque is Determined to End Child Marriage in New Hampshire*, TEEN VOGUE (Sept. 7, 2017), <https://www.teenvogue.com/story/cassandra-levesque-is-determined-to-end-child-marriage-in-new-hampshire> [<https://perma.cc/5NXL-JCMK>] (“What [Bates is] saying is, ‘She’s old enough to marry, but not old enough to make decisions about marriage.’”).

⁵⁶ At the time, the minimum marital age for girls in New Hampshire was thirteen. See N.H. REV. STAT. ANN. § 457:4 (West 2018). In 2019, at nineteen years old, that Girl Scout, Cassandra Levesque, began her first term as a New Hampshire state representative. See Jason Claffey, *NH Girl Scout Who Helped End Child Marriage Wins Election*, PATCH, <https://patch.com/new-hampshire/portsmouth-nh/nh-girl-scout-who-helped-end-child-marriage-wins-election> [<https://perma.cc/CKY7-XS4C>] (last updated Nov. 11, 2018, 4:52 PM).

⁵⁷ Unchained at Last is the lead organization working to change marital age restrictions across the United States. See *Child Marriage – Progress*, *supra* note 47.

⁵⁸ Eleanor Goldberg, *New York’s Child Marriage ‘Ban’ Still Doesn’t Protect Girls*, HUFFPOST (June 21, 2017, 9:01 AM), https://www.huffpost.com/entry/new-york-finally-banned-child-marriage_n_5949738ee4b0e84975504d42 [<https://perma.cc/QNV5-GE8Y>].

⁵⁹ Fraidy Reiss, *Despite Progress, Child Marriage is Still Legal in All 50 States*, N.Y. TIMES: ON THE GROUND (July 26, 2017), <https://kristof.blogs.nytimes.com/2017/07/26/despite-progress-child-marriage-is-still-legal-in-all-50-states> [<https://perma.cc/W2PM-5TLH>] (describing how Texas law allows sixteen- or seventeen-year-olds to marry if they are legally emancipated).

⁶⁰ *Id.* (arguing that allowing emancipated teens to marry will just shift—but not cure—the problem of parents coercing their children into premature marriages, because parents will merely force their children to fill out an emancipation form instead of forcing their children to apply for a marriage license).

⁶¹ See Goldberg, *supra* note 58.

⁶² *Id.*

organization like Unchained at Last or a women's shelter, but it is difficult for organizations to help girls under the age of eighteen.⁶³ Because minors are not granted a full set of adult rights, a child bride may find herself trapped in a marriage without legal recourse or protection.⁶⁴ In some states, a girl can enter a marriage but may not have a legal path to file for divorce.⁶⁵ Moreover, while adult shelters provide confidentiality protections, child brides cannot expect confidentiality at a youth shelter where Child Protective Services can intervene.⁶⁶ Nor can children find safe haven in an adult shelter, because adult shelters typically turn away individuals under eighteen for liability reasons.⁶⁷ Additionally, organizations are hesitant to help child brides escape their marriages because they can face criminal charges for helping a child run away or for contributing to the delinquency of a minor.⁶⁸ With no consistent laws across the nation, the current state of affairs regarding marital age is both confusing and dangerous.⁶⁹

⁶³ *Id.*

⁶⁴ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 5 (“Before a girl gains the rights of a legal adult, she may be legally unable to take critical steps to protect herself. In the United States, the legal dividing line between children and adults is significant and meaningful, and can leave a child trapped in a marriage with an adult.”).

⁶⁵ See TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 6; see also Lisa W. Foderaro, *Child Marriage Is Sharply Curtailed by New York Legislature*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/08/nyregion/child-marriage-is-sharply-curtailed-by-new-york-legislature.html> [<https://perma.cc/L29M-59TV>].

⁶⁶ See Goldberg, *supra* note 58; TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 5; Foderaro, *supra* note 65.

⁶⁷ See Goldberg, *supra* note 58; Foderaro, *supra* note 65.

⁶⁸ Conley, *supra* note 50; see also TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 5 (“Depending on the state, a girl facing forced marriage may not be able to leave home without being taken into custody and returned by police. She may not be able to stay in a domestic violence shelter at all or in a youth shelter for longer than a few days. If friends take her in, they could risk being charged with contributing to the delinquency of a minor or harboring a runaway. And, if she tries to get a place of her own, she may find no one willing to rent to her since in many circumstances, minors cannot be held to contracts they enter.”).

⁶⁹ See generally Jackson, *supra* note 29.

C. *Historical and Legal Overview*

Family law (including marriage) is generally governed at the state level.⁷⁰ All states limit or restrict marriage to some degree. Marriage between siblings or parents and children, for example, is outlawed.⁷¹ Marriage is reserved for two parties.⁷² A marriage cannot be entered into by someone who is a legal party to a prior, on-going marriage.⁷³ Age is but another restriction on marriage.⁷⁴

Even the federal government has been attuned to the relationship between age and marriage⁷⁵ and has generally operated under the assumption that children are not ripe for matrimonial life.⁷⁶ The purposes for setting a minimum marriage age are, thus, twofold: (1) to prevent the marriage of an immature party so as to reduce the chance for divorce and promote familial stability, and (2) to provide children—the products of marriage—with the guardianship of responsible adults.⁷⁷ In most states, the laws controlling when minors can marry have been set for quite some time.⁷⁸

For most of early American history, it was fairly common for minors (particularly girls) to get married before reaching majority age,⁷⁹ but even during the nineteenth and early twentieth centuries, some

⁷⁰ HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 31 (2d ed. 1988).

⁷¹ *Id.* at 80.

⁷² *Reynolds v. United States*, 98 U.S. 145, 161–67 (1878) (holding that polygamy is not protected by the Constitution).

⁷³ *Id.*; *see generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁷⁴ *Moe v. Dinkins*, 669 F.2d 67 (2d Cir. 1982) (holding that age restrictions on marriage are constitutional).

⁷⁵ SYRETT, *supra* note 12, at 2–4.

⁷⁶ CLARK, *supra* note 70, at 90 (“[S]ome maturity is important for marriage.”).

⁷⁷ *Id.*

⁷⁸ SYRETT, *supra* note 12, at 8–11.

⁷⁹ Majority age is the age at which an individual acquires full legal rights as an adult. In most states, the majority age is eighteen. *See generally* SYRETT, *supra* note 12. At common law, children were considered capable of consenting to marriage at the age of seven. This meant that during the colonial era, girls as young as twelve and boys as young as fourteen could legally marry. These age designations were adopted by the colonists from English common law and were thought to reflect the age at which each gender reached physical maturity. *See* AREEN ET AL., *supra* note 37, at 78; CLARK, *supra* note 70, at 23, 88.

states were concerned about child marriage.⁸⁰ As society evolved, attitudes about child marriage shifted.⁸¹ For instance, the public was outraged when twenty-two-year-old Charlie Johns married his nine-year-old neighbor, Eunice Winstead, in Tennessee in 1937.⁸² Similar indignation penetrates society today.⁸³ At the time of the Winstead marriage, there was no minimum marital age in Tennessee, and minors did not need parental permission to wed.⁸⁴ The couple nonetheless falsified Winstead's age in order to get a marriage license.⁸⁵ Within weeks, Tennessee legislators passed laws limiting a minor's ability to marry.⁸⁶ Minnesota, Rhode Island, and Washington, D.C. followed with similar reforms.⁸⁷ But, since then, laws regarding child marriage have mostly vanished from the national conversation; Americans began to think of child marriage as a problem that happens abroad.⁸⁸ Only in the past few years have lobbyists once again rallied to abolish these outdated statutes.⁸⁹

⁸⁰ A few southern states, for example, passed additional laws to dissuade men from marrying girls under the age of sixteen for the sole purpose of gaining a girl's inheritance. See SYRETT, *supra* note 12, at 165–201.

⁸¹ SYRETT, *supra* note 12, at 202–04, 212.

⁸² *Id.* at 202–03; see also *The Case of the Child Bride*, LIFE, Feb. 15, 1937, at 15 (referenced in Tsui, *supra* note 23).

⁸³ See, e.g., Nurith Aizenman, *Is It Legal for an Older Man to Court a Child Bride in the U.S.?*, NPR: GOATS AND SODA (Nov. 15, 2017, 12:06 PM), <https://www.npr.org/sections/goatsandsoda/2017/11/15/564322180/is-it-legal-for-an-older-man-to-court-a-child-bride-in-the-u-s> [<https://perma.cc/5S7J-DTWL>] (“The national news this week has been dominated by accusations against U.S. Senate candidate Roy Moore—both the allegations that he sexually assaulted at least two teenage girls and also that he attempted to date teenagers while he was in his 30s. Moore denies the allegations. But the stories have prompted discussion about a certain ‘courting’ practice in pockets of the fundamentalist Christian community to which Moore belongs: Older men ask out young women, including teenagers, with their parent’s permission and with an eye toward marriage.”).

⁸⁴ SYRETT, *supra* note 12, at 214–15 n.21.

⁸⁵ *Id.* at 202.

⁸⁶ *Id.* at 214–16 n.24.

⁸⁷ *Id.* at 216 n.24.

⁸⁸ See Tsui, *supra* note 4.

⁸⁹ See Tsui, *supra* note 23.

1. The Significance of Eighteen

Young people around the country celebrated when Congress lowered the voting age from twenty-one to eighteen in 1971.⁹⁰ Ever since, eighteen has become the official age of adulthood in almost every state.⁹¹ An eighteenth birthday today comes with the grant of many rights and responsibilities: in most states, eighteen is the age at which a person can first open a bank account, serve on a jury, sign a lease, and enlist in the military without parental permission.⁹² Eighteen is also the age at which one can independently marry.⁹³

2. Applying for a Marriage License

While eighteen is the legal minimum marriageable age in most states, the laws in all fifty states allow minors to marry earlier.⁹⁴ This is consistent with the Uniform Marriage and Divorce Act (UMDA),⁹⁵ which sets the age for marital capacity at eighteen but permits a sixteen- or seventeen-year-old to wed if the child has the consent of her parents/guardians *or* judicial approval.⁹⁶ If a child is under the age of sixteen, she may marry with the consent of both parents/guardians *and* judicial approval.⁹⁷ In order for a judge to consent to the marriage of an individual under the age of sixteen, the UMDA requires a court to find: (1) that the underage party is capable of assuming the responsibilities of

⁹⁰ U.S. CONST. amend. XXVI, § 1. *See also* John W. Finney, *Senate Approves 18-Year-Old Vote in All Elections*, N.Y. TIMES (Mar. 11, 1971), <https://www.nytimes.com/1971/03/11/archives/senate-approves-18yearold-vote-in-all-elections-amendment-to.html> [https://perma.cc/78AK-MGTL].

⁹¹ Tsui, *supra* note 23 (the age of majority is twenty-one in Mississippi and nineteen in Alabama and Nebraska).

⁹² *Id.*

⁹³ *Id.*; *see also* Teri Dobbins Baxter, *Child Marriage as Constitutional Violation*, 19 NEV. L.J. 39, 46 (2018).

⁹⁴ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 30–34 (appendix comparing each state's child marriage laws).

⁹⁵ Unif. Marriage and Divorce Act (1973). It is important to note that the UMDA is a model code that does not have the force of law. *See* Uniform Law Commission, *Marriage and Divorce Act, Model Summary*, <https://perma.cc/E32F-C9TA> (last visited Feb. 12, 2018).

⁹⁶ Unif. Marriage and Divorce Act § 203 (1973).

⁹⁷ *Id.*

marriage, and (2) that the marriage will serve her best interest.⁹⁸ The UMDA also requires a party applying for a marriage license to put forward satisfactory proof of age.⁹⁹

Since marriage is governed at the state level, there is no consistent marital age across the nation.¹⁰⁰ Some states set an age floor at which a person can marry (usually fourteen, fifteen, or sixteen), but about half of the states do not include any bottom-line age restrictions in their marriage statutes.¹⁰¹ In those states, there is technically no minimum age that a person must reach before legally marrying.¹⁰² But even in those states, there are barriers in place to prevent a minor from marrying, such as the maturity and best-interest-of-the-child tests outlined in the UMDA.¹⁰³ The strength of those procedural barriers, however, often depends on the age of the minor. States are generally more protective of individuals under the age of sixteen.¹⁰⁴ Despite these requirements and procedural barriers, minors still manage to marry at an alarming rate.¹⁰⁵

Finally, age is often overlooked when there are extraordinary circumstances (such as pregnancy) warranting the marriage.¹⁰⁶ While the UMDA warns that pregnancy alone does not ensure that the marriage will be in the child's best interest,¹⁰⁷ pregnancy and childbirth are explicitly accounted for in the marriage statutes of nine states, which grant special permission for minors who are pregnant or who have

⁹⁸ *Id.* § 205(b).

⁹⁹ Comments to Unif. Marriage and Divorce Act § 203 (1973) (“Satisfactory proof of age and of required consent includes such methods as may be prescribed under Section 202(b) in the license form, or any other proof that should satisfy a reasonable official exercising unarbitrary judgment.”).

¹⁰⁰ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 30–34.

¹⁰¹ *See supra* note 11.

¹⁰² *Id.*; *see also* Lynn D. Wardle, *Rethinking Marital Age Restrictions*, 22 J. FAM. L. 1 (1983).

¹⁰³ *See supra* text accompanying note 98.

¹⁰⁴ Most states that set an age floor do so at sixteen, indicating that girls under the age of sixteen are categorically different from girls aged sixteen through eighteen. *See* TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 30–34.

¹⁰⁵ *See, e.g.*, Tsui, *supra* note 4 (collecting data on over 200,000 minors who married between 2000 and 2015).

¹⁰⁶ Jackson, *supra* note 29, at 354–55.

¹⁰⁷ Unif. Marriage and Divorce Act § 205(b) (judicial approval) (1973).

given birth to marry before their eighteenth birthday.¹⁰⁸ In reality, pregnancy very much influences a judge's willingness to grant a marriage license to a child bride despite the fact that it might not be in the new mother's best interest.¹⁰⁹

3. The Role of Parents

The hodgepodge of laws that make up marital age restrictions enable children seeking to marry to shop around for states with lenient rules and gives parents enormous discretion to decide when and whom their daughters should marry.¹¹⁰ In a vast majority of circumstances, states require children under the age of eighteen to seek parental consent for marriage. The younger the child is, the more likely both parental and judicial consent will be needed for the marriage license to be issued.¹¹¹

Consulting with the adults in a child's life before permitting the child to marry sounds like a good idea in theory, but that is not always the case. Parents do not always act in their child's best interest, and child marriages are frequently forced or coerced by parents against their daughter's will.¹¹² Parental consent also becomes a problem when a

¹⁰⁸ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 11–12; *see, e.g.*, 2019 Ark. Acts 849 (“If an application for a marriage license is made where one (1) or both parties are under eighteen (18) years of age but older than sixteen (16) years of age and the female is pregnant, both parties may appear before a judge of the circuit court of the district where the application for a marriage license is being made.”); The other states include: Florida, Indiana, Kentucky, Maryland, New Mexico, North Carolina, Ohio, and Oklahoma. *See* TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 11–12.

¹⁰⁹ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 11 (“Pregnancy is often treated by state laws and by judges as definitive proof that marriage would be in the minor's best interests.”).

¹¹⁰ Tsui, *supra* note 23.

¹¹¹ Tsui, *supra* note 4.

¹¹² TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 10 (“States that make parental consent the gatekeeper to marriages of children pose one of the greatest concerns with respect to forced marriages, since parental consent can so easily equal parental coercion.”); *Fraidy Reiss: Web Extra*, CBS NEWS (May 5, 2017) (interview at 3:20), <https://www.cbsnews.com/video/fraidy-reiss-web-extra> [<https://perma.cc/A8VA-9BTC>] (“The people that are affected by [child marriage] are women or girls . . . and the perpetrators are almost always the parents or family members.”).

parent's beliefs are at odds with their child's religious convictions.¹¹³ Parents can be held criminally liable for the repercussions of child marriage in child neglect proceedings.¹¹⁴ Many girls who agree to marry before their eighteenth birthday do so out of fear that if they do not marry, their family will have to face their state's criminal justice system.¹¹⁵ In those cases, child marriage is hardly the girl's choice. Finally, even if a parent does not outright "force" the marriage of their child, parents greatly influence their child's apparent decision to wed;¹¹⁶ sometimes the child bride might not even know that parental consent was required.¹¹⁷ On the other hand, conflict may also arise when the child seeks to wed, but one or both parents refuse to give consent.¹¹⁸

¹¹³ 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/5PYU-JLAC>].

¹¹⁴ See, e.g., *People v. Benu*, 385 N.Y.S.2d 222 (Crim. Ct. 1976) (convicting a father of endangering the welfare of his thirteen-year-old daughter by arranging her marriage); *In re Interest of Flynn*, 318 N.E.2d 105 (Ill. App. Ct. 1974) (finding a couple to be unfit parents after they sold their twelve-year-old daughter into marriage with a stranger for \$28,000); *State v. Gans*, 168 Ohio St. 174 (1968) (holding that parents would be liable for contribution to delinquency for enabling their sixteen-year-old daughter to enter into a marriage); see also *The Frontline Dispatch: Child Marriage in America*, PBS (Sept. 14, 2017) (downloaded using iTunes) (finding the child's father guilty of injury to a child since he consented to the marriage of his pregnant fourteen-year-old daughter and her statutory rapist), transcript available at <https://www.pbs.org/wgbh/frontline/podcast/dispatch/child-marriage-in-america/transcript> [<https://perma.cc/33TU-6PQD>] [hereinafter Frontline Dispatch Podcast].

¹¹⁵ In Florida, for example, an eleven-year-old girl was pushed by her family and church officials to marry her twenty-year-old rapist to avoid a criminal investigation. She had been raped at the age of nine, became a mother at the age of ten, and, finally, a wife at eleven. That girl now spearheads campaigns to change Florida's marital age restriction statutes. Meanwhile, reports show that marriages involving children under sixteen still occur in Florida "at a rate of one every few days." See 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/99HG-KNAV>].

¹¹⁶ See also Frontline Dispatch Podcast, *supra* note 114 ("I was influenced, but I wasn't forced.' . . . [T]here was the occasional, 'is this what you what [sic]?' . . . from everybody and then everybody would just turn and look at me and I'm like, 'um, yeah, no pressure Heather, it's either this or everybody goes to jail, basically.'"). The protagonist of the podcast, Heather, married her twenty-four-year-old boyfriend, Aaron, the day after her fifteenth birthday so as to protect Aaron from a statutory rape charge. In Idaho, where the couple resided, it is a felony for an adult over eighteen to have sex with anyone younger than sixteen.

¹¹⁷ *Esther's Story*, UNCHAINED AT LAST, <http://www.unchainedatlast.org/about-arranged-forced-marriage/esthers-story> [<https://perma.cc/X6MY-WL3Z>] (last visited Apr. 29, 2019) ("I

While courts have ruled that parental consent requirements are constitutional,¹¹⁹ there is some uncertainty regarding how many parents must consent and under what circumstances non-custodial parents can provide sole approval.¹²⁰ Until recently, Mississippi, for example, allowed “any interested party” three days to object to the issuance of a marriage license.¹²¹ Alternatively, the Supreme Court of Nevada upheld a statute permitting a fifteen-year-old to marry with the consent of only one parent and judicial approval.¹²² In that case, the court rejected the non-consenting parent’s claim that this statutory structure deprived the non-consenting parent of his fundamental right to the parent-child relationship.¹²³

4. Judicial Consent

In some states, like Illinois, even when a parent does not consent to the marriage of their child, a judge can still issue a marriage license to a minor.¹²⁴ Judges involved in the process are often generalists who do not

didn’t understand why my parents signed my marriage license application. I thought all parents signed for their children. I didn’t know I needed ‘parental consent’ because I was not yet 18.”).

¹¹⁸ See, e.g., Tsui, *supra* note 113 (“Our concern is with the 16- and 17-year-old who becomes pregnant and wants to marry the father of her child if she wishes to do so If her parents are not supportive and are unwilling to help her, they may force her into having an abortion. Or, she may feel that she has no choice than to have an abortion.”).

¹¹⁹ See, e.g., *Moe v. Dinkins*, 669 F.2d 67 (2d Cir. 1982) (rejecting the argument put forward by a child bride that she had a constitutional right to marry before the age of eighteen, and upholding a statutory scheme that required parental consent of minors seeking to marry).

¹²⁰ Comments to Unif. Marriage and Divorce Act § 205 (judicial approval) (1973); see also Frontline Dispatch Podcast, *supra* note 114. Law enforcement officials became aware of Aaron and Heather’s situation when Heather’s mother alerted the authorities that her fourteen-year-old daughter was impregnated by a twenty-four-year-old man and that the girl’s father intended to oversee their marriage.

¹²¹ MISS. CODE ANN. § 93-1-7 (Repealed by Laws 2012, Ch. 431, § 2, eff. July 1, 2012). Note that Mississippi only requires parental permission for the marriage of a minor if the female child is under the age of fifteen or if the male child is under the age of seventeen. See MISS. CODE ANN § 93-1-5 (West 2019).

¹²² *Kirkpatrick v. Eighth Judicial District Court*, 64 P.3d 1056 (Nev. 2003).

¹²³ *Id.*; see also IRA ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 183 (5th ed. 2010).

¹²⁴ ILL. COP. STAT. ANN. 750 § 5/208 (West 2019). This is consistent with UMDA § 205(b), under which a court can grant the underage marriage of a sixteen- or seventeen-year-old

specialize in family, juvenile, or domestic relations law and are often ill-equipped to identify concerns.¹²⁵ As of October 2017, in eight states, clerks or administrative assistants alone, without judicial input, are solely responsible for approval of a minor's marriage license.¹²⁶ Of the states that do require judicial consent, only seventeen of them oblige a judge to consider the child's best interest.¹²⁷

The problems with judicial consent can best be understood by the testimony of the judge in *In re J.M.N.*, where a non-custodial parent brought her fourteen-year-old daughter from Mississippi, where they resided, to Tennessee, where marital age restrictions were more lenient, so that her daughter could marry her eighteen-year-old boyfriend.¹²⁸ In that case, the mother signed a parental consent waiver without ever providing official record of her daughter's birth date.¹²⁹ The form that the mother signed waived the age restriction to marriage and suspended the three-day waiting period for the issuance of the marriage license.¹³⁰ The mother, her fourteen-year-old daughter, and soon-to-be son-in-law went directly to the county courthouse for the marriage ceremony. The judge in that case testified that, as was customary, he signed the parental consent waiver without much pause.¹³¹ Neither the mother, daughter, nor boyfriend ever appeared before the judge.¹³² Since the mother was present and provided her consent, it was court policy to sign the waiver.¹³³ While some judges take a more individualized approach to the

without parental consent only after the court and the parties have made "a reasonable effort" to notify the child's parents or guardian.

¹²⁵ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 14 ("[G]eneralist courts . . . cannot be expected to be attuned to coercive control or other dynamics of family and intimate partner violence.").

¹²⁶ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 2.

¹²⁷ *Id.*

¹²⁸ *In re J.M.N.*, No. 00615, 2008 WL 2415490, at *1 (Tenn. Ct. App. 2008).

¹²⁹ *Id.* at *2.

¹³⁰ *Id.* at *5.

¹³¹ *Id.* at *3 ("[The judge had] no specific recollection of the matter involving Jacy and Henry, but that it was not uncommon for him to get requests for waiver of the age restriction for marriage.").

¹³² *Id.* at *4.

¹³³ *Id.* On appeal, the court struck down this practice and said two parents were, if possible, required to give parental consent—especially if the parent who shows up is non-custodial—as was the case here.

marriage license approval process, that is often not the case.¹³⁴ Typically, a parent and/or the underage individual file boilerplate consent waivers with administrative clerks, who give the forms to the judge to sign without conducting an in-depth inquiry.¹³⁵

The official comments to the UMDA contain helpful guidance for judges and encourage judges to gather personal information about *both* parties prior to the prospective marriage so as to assess the capacity of the underage party in determining whether it would be in her best interest to marry.¹³⁶ But these guidelines are merely suggestions,¹³⁷ and each state is given broad latitude in their application of the guidelines. The comments also note that a judge who never provides consent for a sixteen- or seventeen-year-old to wed is guilty of “abusing his discretion.”¹³⁸ Accordingly, the comments suggest that child marriage is acceptable so long as it is the result of prudently reasoned judicial consent, and that a total ban of child marriage is undesirable.¹³⁹ But one county clerk from Delaware succeeded in changing his state’s law.¹⁴⁰ After he was asked to issue a marriage license to a pregnant fourteen-year-old girl seeking to marry a twenty-seven-year-old man, Ken Boulden became motivated to change his state’s pregnancy exception to the marital age restrictions.¹⁴¹ Boulden, who has performed

¹³⁴ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 14–16.

¹³⁵ See *supra* text accompanying notes 128–33 (discussing the judicial approval process).

¹³⁶ Comments to Unif. Marriage and Divorce Act § 205 (judicial approval) (1973).

¹³⁷ *Id.* (“[The committee] deliberately avoids detailing procedural rules to govern the judicial proceedings.”). Some additional guidelines include: a judge may not refuse approval because he believes the marriage would not serve the best interest of the adult party; sixteen- or seventeen-year-old applicants cannot be denied approval solely because a parent refuses to consent to the marriage. *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See DEL. CODE ANN. tit. 13, § 123 (West 2007). Drafted by Boulden, the bill was ultimately shepherded through the legislative process by Governor Ruth Ann Minner and established as law in May 2007. See also Claire Bushey, *Age of Consent Muddles Law on Marriage vs. Rape*, WOMEN’S ENEWS (June 7, 2017), <https://womensenews.org/2007/06/age-consent-muddles-law-marriage-vs-rape> [<https://perma.cc/6UHA-DVZA>].

¹⁴¹ Frontline Dispatch Podcast, *supra* note 114 (“Boulden knew that it was his job to issue the license but he just couldn’t bring himself to do it. So he told the family to come back a couple days later. And when they did, he had the police there waiting. . . . [He] had the mother arrested for child endangerment and for contributing to the delinquency of a minor, [and] had the male arrested on a charge of statutory rape.”).

approximately 15,000 marriages, refused to issue the license and had the police waiting at his office when the couple returned a few days later.¹⁴² Boulden drafted new legislation—that passed the Delaware House in 2007—requiring *anyone* under the age of eighteen to petition a judge for permission to marry.¹⁴³ A union like this may have been prevented in a state in which there is a requisite waiting period between the issuance of a marriage license and the time in which the parties can get married,¹⁴⁴ but those technicalities vary from state to state and can be easily waived in some venues.¹⁴⁵

5. Recognition of the Marriage in Other States

The fact that the minimum marital age varies from state to state encourages minors seeking to marry to travel to other jurisdictions to wed.¹⁴⁶ Typically, a marriage valid where contracted must be recognized elsewhere.¹⁴⁷ But there are exceptions to this general rule in the event that the marriage violates a natural law, like polygamy or incest, or where a strong public policy interest is at stake.¹⁴⁸ Known as the “place of celebration” rule, the Uniform Marriage Evasion Act¹⁴⁹ was

¹⁴² *Id.* The groom was arrested for statutory rape.

¹⁴³ DEL. CODE ANN. tit. 13, § 123 (West 2007).

[I]f an applicant for a license to marry is under the age of 18 years, the license shall not be issued unless a Judge of the Family Court sitting in the county where the minor applicant resides signs an order allowing the applicant to marry. . . . The Court shall make a decision on the petition in accordance with: the best interests of the minor seeking to be married; the wishes of the minor and such minor’s parents or legal guardians; the mental and physical health of the individuals to be married; the criminal history of the individuals seeking to be married; whether the proposed marriage would violate any Delaware laws; and such other information which the Court deems appropriate.

Id.

¹⁴⁴ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 22–23.

¹⁴⁵ As was the case in *In re J.M.N.*, No. 00615, 2008 WL 2415490 (Tenn. Ct. App. 2008).

¹⁴⁶ Clark, *supra* note 70, at 96.

¹⁴⁷ Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 460 (2005) (this general rule is known as the law of the “place of celebration”); *see also* Ellman, *supra* note 123, at 135.

¹⁴⁸ Grossman, *supra* note 147, at 461–70.

¹⁴⁹ Unif. Marriage Evasion Act § 1 (1912).

promulgated in 1912 in an effort to deal with evasive, unwanted, or unlawful marriages, such as those between individuals of different races.¹⁵⁰ Child marriage, however, has never been considered a categorical or automatic exception to the place of celebration rule.¹⁵¹ While one Arizona court has created an express exception in the event of child marriage, holding that a minor cannot avoid state marriage laws by marrying in another state,¹⁵² that is not the common law approach.¹⁵³ It remains unclear (and unlikely) that third parties may force the annulment of a marriage between mature, underage parties valid elsewhere on the grounds of marriage evasion.¹⁵⁴ This is despite the fact that marriage evasion rules are not uncommon in American legal history; a reverse evasion statute was recently in place in Massachusetts, barring some out-of-state couples from marrying in Massachusetts if they could not marry in their home state.¹⁵⁵ Massachusetts ultimately repealed the law in 2008.¹⁵⁶ While reverse evasion laws might be harmful to the practice of same-sex marriage,¹⁵⁷ they can be an effective tool for curbing child marriage and creating uniformity among the states.

¹⁵⁰ Grossman, *supra* note 147, at 465; see also *Policy—The Uniform Marriage Evasion Act*, SOC. SEC. ADMIN., <https://secure.ssa.gov/poms.NSF/lrx/0200305155> [<https://perma.cc/77H4-K388>] (last updated Sept. 11, 2008) (outlining the Act’s main provisions: (1) an individual cannot leave a State to marry elsewhere simply for the purpose of evading their own State’s marriage laws—such a marriage will be considered void; and (2) a State may not perform the civil marriage between two individuals who reside in and intend to return to another state in which their union is prohibited).

¹⁵¹ Grossman, *supra* note 147, at 469 (unlike polygamy or incest, child marriage does not offend natural law and is even encouraged on occasion).

¹⁵² *Medlin v. Medlin*, 981 P.2d 1087, 1089 (Ariz. Ct. App. 1999) (a sixteen-year-old male and twenty-two-year-old female, both Arizona natives, traveled to Nevada to wed). Under Arizona law, ARIZ. REV. STAT. ANN. § 25–112 (2019), “[p]arties residing in this state may not evade the laws of th[e] state relating to marriage by going to another state or country for solemnization of the marriage.”

¹⁵³ See, e.g., *Mangrum v. Mangrum*, 220 S.W.2d 406, 406–08 (Ky. Ct. App. 1949) (father unable to avoid marriage of thirteen-year-old child because that marriage was valid where celebrated).

¹⁵⁴ Grossman, *supra* note 147, at 469–70.

¹⁵⁵ MASS. GEN. LAWS ch. 207 §§ 11, 12, 13, 50 (1913).

¹⁵⁶ Jennifer L. Levi, *Marriage Equality for Same-Sex Couples: Where We Are and Where We Are Going*, 22 J. AM. ACAD. MATRIM. L. 55, 76 (2009).

¹⁵⁷ Edward Stein, *Eulogy for “Marriage Evasion” in Massachusetts: 1913–2008*, HUFFPOST, https://www.huffpost.com/entry/eulogy-for-marriage-evasi_b_116243 [<https://perma.cc/W6M4-3HJE>] (last updated Dec. 6, 2017).

6. Getting Out of the Marriage¹⁵⁸

Typically, parties to a contract and, sometimes, interested third parties can attack or raise suits flowing from that contractual arrangement.¹⁵⁹ Accordingly, the minor parties to a marriage and their parents—who are presumably “interested parties”—have typically been able to contest a marriage entered into by a minor.¹⁶⁰ Generally, parents or guardians can only bring suit if the local statute expressly authorizes a parent or guardian to have standing.¹⁶¹ Getting out of a child marriage is important because advocates raise concerns that, in some states, children under the age of eighteen can enter into a marriage, but since they are not given the full legal rights of an adult, they cannot then file for divorce.¹⁶²

II. ARGUMENTS FOR AND AGAINST A TOTAL BAN OF CHILD MARRIAGE

Advocates seeking to end child marriage in America tout a blanket rule that prohibits anyone under the age of eighteen from entering a marriage, without exception.¹⁶³ Countries like El Salvador and Tanzania, where the United States considers child marriage a violation of international law, have already raised their minimum marital age to eighteen.¹⁶⁴ Despite overt criticism of the practice of child marriage in

¹⁵⁸ Since this Note is primarily concerned with the formation of child marriages, it will not spend much time on child divorce or annulments, but the topic bears mention because many child marriage cases are only brought to light when a parent or interested third party files suit to void the union. For more on divorce and annulments of child marriages, see THOMAS A. JACOBS, 2 CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS § 11:9 (2018); Clark, *supra* note 70, at 93–94.

¹⁵⁹ See JACOBS, *supra* note 158 (noting that marriage is a basic contractual agreement).

¹⁶⁰ See Clark, *supra* note 70, at 95.

¹⁶¹ *Id.*

¹⁶² Reiss, *supra* note 59 (“[C]hildren can easily be forced into marriage or forced to stay in a marriage before they become legal adults, because they face overwhelming legal and practical barriers if they try to leave home, access a shelter, retain an attorney or bring a legal action.”).

¹⁶³ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 14 (“[T]he most effective approach to end child marriage, impede forces marriages of children, and mitigate the risks of early child marriage, is to set the minimum marriage age at 18 without exceptions.”).

¹⁶⁴ BBC News, *Why Does the U.S. Have so Many Child Brides?*, YOUTUBE (Oct. 24, 2017), <https://www.youtube.com/watch?v=erRrF8YWGd4> [<https://perma.cc/37EE-DG2C>].

other countries, the United States has failed to follow suit.¹⁶⁵ Interestingly, resistance to a complete ban on child marriage has come from both sides of the political divide: women's rights organizations and the American Civil Liberties Union, as well as libertarian politicians and anti-abortion groups.¹⁶⁶

A. *The Legal Status of Children*

Laws surrounding children's issues have been formed in an inconsistent fashion.¹⁶⁷ The Supreme Court established the fundamental right of adults to marry and raise children in *Meyer v. Nebraska*, but did not extend those rights to children.¹⁶⁸ Nor has the Supreme Court affirmatively established that a child has a constitutional right to sexual privacy or intimacy.¹⁶⁹ In fact, children's constitutional rights were

¹⁶⁵ Burris, *supra* note 24, at 164–65. Only two states have adopted a total ban on child marriage after an uphill battle for advocates. The New Jersey ban, for example, was conditionally vetoed by then-Governor Chris Christie, who wanted to carve out exceptions for sixteen- and seventeen-year olds to wed. See Matt Friedman, *Ban on Child Marriages Conditionally Vetoed by Christie*, POLITICO (May 11, 2017, 1:13 PM), <https://www.politico.com/states/new-jersey/story/2017/05/11/ban-on-child-marriages-conditionally-vetoed-by-christie-111987> [<https://perma.cc/Q97K-JUMB>] (noting that exceptions should be carved out for sixteen- and seventeen-year-olds who want to marry for religious reasons); see also Brent Johnson, *Christie Rejects Ban on Marriage for N.J. Teens Under 18*, NJ.COM (May 11, 2017), https://www.nj.com/politics/2017/05/christie_rejects_ban_on_marriage_for_nj_teens_unde.html [<https://perma.cc/JP3M-XRN8>].

¹⁶⁶ Tsui, *supra* note 113 (opponents to the total ban argue that a blanket rule does not adequately respect religious traditions and cultural mores that promote marriage before parenthood, and that a total ban approach limits a mature teenager's ability to leave the foster care system via emancipation).

¹⁶⁷ Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 277 (2006) (“The law of children has developed in a patchwork and inconsistent fashion. Decisionmakers including Congress, state legislatures, the Supreme Court, and state courts have created laws and decided cases without a comprehensive vision of what it means to be a child or how children think and behave.”).

¹⁶⁸ *Meyer v. Nebraska*, 262 U.S. 390 (1923) (establishing the right to marry, to set up a home, and to raise children under the Fourteenth Amendment).

¹⁶⁹ The Supreme Court established this right for adults in *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, and

limited by the Supreme Court in *Prince v. Massachusetts*.¹⁷⁰ Since then, minors have had to maneuver through a patchwork of federal and state laws that determine the position of children within the family structure.¹⁷¹

The legal rights of children are generally less robust than those of their adult counterparts,¹⁷² and, though inconsistent, laws relating to children are generally guided by one fundamental legal concept: the best interest of the child.¹⁷³ The state's duty to protect children is embedded in our common law and historical tradition.¹⁷⁴ In this capacity, the state is said to act *in loco parentis* to children by providing caretaking functions.¹⁷⁵ As such, it is the state's duty to protect children by shielding them from premature marriage, assuming that it is in a child's best interest *not* to marry before reaching majority age.¹⁷⁶

education. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”).

¹⁷⁰ 321 U.S. 158 (1944) (establishing the state's role to parent in a case where a nine-year-old girl was forced to work under dangerous conditions by her guardian).

¹⁷¹ Sarah J. Baldwin, Note, *Choosing a Home: When Should Children Make Autonomous Choices About Their Home Life?*, 46 SUFFOLK U. L. REV. 503, 504 (2013).

¹⁷² See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (“We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”); see also *supra* notes 90–93 and accompanying text (noting that children are not treated the same as adults in the eyes of the law).

¹⁷³ See MARTIN R. GARDNER, MARCI A. HAMILTON & ANNE PROFFITT DUPRE, *CHILDREN AND THE LAW: CASES AND MATERIALS* 65 (4th ed. 2017).

¹⁷⁴ See HOWARD COHEN, *EQUAL RIGHTS FOR CHILDREN* 38 (1980) (claiming that protection of children is the cornerstone for family life and social policy); SARAH H. RAMSEY & DOUGLAS E. ABRAMS, *CHILDREN AND THE LAW IN A NUTSHELL* 9 (3d ed. 2008) (characterizing protection as a basis for denying rights to children); Robert E. Emery, *Children's Voices: Listening—and Deciding—Is an Adult Responsibility*, 45 ARIZ. L. REV. 621 (2003) (arguing that adults should shield children from decision-making responsibility).

¹⁷⁵ See *Moe v. Dinkins*, 533 F. Supp. 623, 629 (S.D.N.Y. 1981) (“The State possesses paternalistic power to protect and promote the welfare of children who lack capacity to act in their own best interest. . . . The State interests in mature decision-making and in preventing unstable marriages are legitimate under its *parens patriae* power.”).

¹⁷⁶ *Id.*; see also Wardle, *supra* note 102; *supra* text accompanying notes 28–40 (citing studies and anecdotes of trauma and exploitation in marriages that include an underage party). Some would even go as far as to argue that a parent who allows their child to marry is guilty of child abuse or neglect, and that the state is responsible for thwarting child marriages from a law enforcement perspective. See Clark, *supra* note 70, at 91 n.26 (“A parent who acts wholly

B. *A Child's Alleged Constitutional Right to Marriage*

The Supreme Court has held that the right to marry falls under the Fourteenth Amendment right to privacy.¹⁷⁷ And while children have been granted some privacy rights—such as the right to have an abortion or use contraception¹⁷⁸—the right to marry is not among them.¹⁷⁹ This means that in our legal system, a sixteen-year-old's choice to have an abortion is protected by the Constitution, but that same girl's decision to marry the father of her unborn child is not.¹⁸⁰ Despite the fact that, as the law stands, children do not have an affirmative constitutional right to marry,¹⁸¹ opponents to a total ban argue that if a child wants to marry before turning eighteen, she should be allowed.¹⁸² Adult decision-

without regard to the welfare of his child in arranging the child's marriage at an age below the statutory minimum may be criminally liable.”); *see also supra* note 114.

¹⁷⁷ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that a Nebraska law restricting foreign-language education violated a parent's Fourteenth Amendment right to make personal choices).

¹⁷⁸ *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

¹⁷⁹ *See Wardle, supra* note 102, at 20–21.

¹⁸⁰ *Id.* at 21. This was the argument put forward by New Jersey Governor Chris Christie when he vetoed a bill seeking to raise the minimum marital age to eighteen. *See Johnson, supra* note 165 (“Christie also said it's ‘disingenuous’ that a 16-year-olds would be banned from marriage when they are allowed in New Jersey to consent to sex and obtain an abortion without parental knowledge.”).

¹⁸¹ While the Supreme Court has not expressly ruled on this question, the Second Circuit put forward an influential opinion on the constitutionality of child marriage. *See Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir. 1982) (upholding a New York marital age restriction statute that required parental consent for the marriage of their minor children). In *Moe*, a thirteen-year-old girl became pregnant by her sixteen-year-old boyfriend and sought to marry him, but her mother refused to consent to the union. Seven months after their child was born, the couple brought suit in federal court in the Southern District of New York seeking declaratory and injunctive relief against enforcement of the state's marital age restrictions. The young couple argued that the marital age restriction unduly burdened them in many ways, including ineligibility for workers' compensation and social security benefits along with the embarrassment and disabilities of having a child out of wedlock. The Second Circuit Court of Appeals rejected the couple's argument and upheld the parental consent scheme because it was rationally related to two legitimate state interests: (1) safeguarding children from premature decision-making, and (2) preventing volatile marriages. For a more complete description of the facts, *see Wardle, supra* note 102, at 2.

¹⁸² *See, e.g., Tsui, supra* note 113.

makers in state legislatures have continually provided avenues that enable children to marry if they so desire.¹⁸³

C. *Balancing the Child's Desire to Marry with Parental Rights*

A child's purported right to marry must be squared with a parent's right to prevent their child's marriage.¹⁸⁴ The reasonable decisions mothers and fathers make in terms of directing the development of their own children are protected by the Constitution.¹⁸⁵ This is true despite the fact that some parents are irresponsible and inhumane towards their children.¹⁸⁶ While the state must act in *loco parentis*, the state cannot displace parents from their constitutionally protected position as guardian or caretaker of their children.¹⁸⁷

But it is not always that simple. A parent's right to protect his child can sometimes be at odds with a child's desire or true best interest: for

¹⁸³ As evidenced by the fact that girls under the age of majority can marry in almost every state. See generally TAHIRIH JUSTICE CTR. REPORT, *supra* note 4.

¹⁸⁴ In *Moe v. Dinkins*, the court justified the parental/judicial consent scheme—among other reasons—given the fact that a parent's wish that his child does not marry would only “temporarily” counteract the child's desire to wed since the child would merely have to wait until she turned eighteen to file for a marriage license on her own. 533 F. Supp. 623, 630 (S.D.N.Y. 1981). This is an argument put forward by advocates today who say that waiting until one's eighteenth birthday to marry is no more than an “inconvenience.” See Frontline Dispatch Podcast, *supra* note 114 (interview with Fraidy Reiss) (“If she's marrying for all the right reasons, delaying the marriage is not denying her the right to marry. She can still marry at 18. It's at worst an inconvenience for her to wait those few months.”). But to many girls who want to marry before turning eighteen, having to wait is much more than an “inconvenience,” and could be cause to be kicked out of town and suffer endless disgrace. See, e.g., *About Mommas House*, MOMMAS HOUSE, http://www.mommashouse.org/why_mommas_is%20needed.html [https://perma.cc/QU8T-SM2E] (last visited Apr. 29, 2019) (noting in their mission statement that teenage mothers often need support when parents kick out their pregnant, unwed teenage daughters).

¹⁸⁵ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (establishing a parental right to direct the upbringing and education of one's child).

¹⁸⁶ *Moe*, 533 F. Supp. at 629 (“Although the possibility for parents to act in other than the best interest of their child exists, the law presumes that the parents ‘possess what the child lacks in maturity’ and that ‘the natural bonds of affection lead parents to act in the best interest of their children.’”) (quoting *Parham v. J.R.*, 442 U.S. 584, 610 (1979)).

¹⁸⁷ *Id.* (“That the governmental power should supersede parental authority in all cases because some parents' may act in other than the best interest of their children is ‘repugnant to the American tradition.’”) (quoting *Parham*, 442 U.S. at 602–03).

example, when a child seeks emancipation to escape her abusive parents' home,¹⁸⁸ or will experience shame and undue hardship from her community if she does not marry.¹⁸⁹ Marriage, in those cases, provides a path to social acceptance and security.¹⁹⁰ Sometimes, even if no extraordinary circumstances are present, a mature child might simply want to enter into a marital relationship.¹⁹¹ When a child is emotionally prepared to make that decision—and the marriage would be in her best interest—she should not be barred from marriage because of the naiveté of a majority of her age group. The American Civil Liberties Union of California argued that banning marriage before eighteen unjustly constrains the basic right to marry.¹⁹² The Children's Law Center of California, a group that offers legal services to foster youth, worries that raising the marriage age would deprive minors of one of their only avenues to exit foster care: through emancipation.¹⁹³ Problems also arise in the context of marital age restriction statutes that give deference to parental consent without giving the child the opportunity to speak freely in a safe space.¹⁹⁴ This is particularly troubling given the fact that eighty

¹⁸⁸ See Tsui, *supra* note 113; *supra* text accompanying note 89. Marriage is one of the only ways out of the foster care system because, in most states, when a child in foster care marries, she is automatically emancipated and conferred with many adult rights despite the fact that she is under the age of eighteen. For more information, see GARDNER, HAMILTON & DUPRE, *supra* note 173, at 169–77 (discussing emancipation and marriage).

¹⁸⁹ See *supra* note 165 (discussing the basis for Governor Christie's veto in New Jersey).

¹⁹⁰ *Id.*; see also Rebecca Beitsch, *Child Brides Join Push to Raise Marriage Age*, PEW CHARITABLE TR. (May 12, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/12/child-brides-join-push-to-raise-marriage-age> [https://perma.cc/HCW8-8ZRC] (noting that the American Civil Liberties Union of California opposed S.B. 273 (Cal. 2017), which originally promoted a total ban on child marriage, because the bill unnecessarily intruded on a child's right to marry). For a critique on the current state of the California bill, see TAHIRIH JUSTICE CTR., LETTER TO OPPOSE SB 273 (TO AMEND LAWS CONCERNING JUDICIAL APPROVALS OF PETITIONS FOR MINORS TO MARRY) (2017), <http://www.tahirih.org/wp-content/uploads/2017/07/06.26-Ltr-of-Opposition-by-Tahirih-Justice-Ctr-to-CA-SB-273.pdf>.

¹⁹¹ See Tsui, *supra* note 113.

¹⁹² *Id.* (“[A total ban] ‘unnecessarily and unduly intrudes on the fundamental right of marriage.’”).

¹⁹³ *Id.*; see also *supra* note 188.

¹⁹⁴ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 16 (“One survivor of a forced marriage recalls that she never even saw a judge, because her grandmother went to court to obtain the order without her.”); see also Frontline Dispatch Podcast, *supra* note 114 (discussing the clerk's statutory duty to approve a marriage involving a minor so long as a parent consents).

percent of child sexual abuse is perpetrated by a parent,¹⁹⁵ and that parents often arrange the premature marriage of their daughters.¹⁹⁶

D. *Infringement on Religious Liberty*

One of the biggest obstacles to the total ban is the fact that legislators are afraid of encroaching on the religious beliefs of communities that value marriage.¹⁹⁷ Marriage, as the argument goes, is a sacred ritual and the cornerstone of religious communal life.¹⁹⁸

The Supreme Court has traditionally given much deference to religious organizations.¹⁹⁹ While the Court has not explicitly ruled on the issue of child marriage, it has upheld the “transcendent importance”²⁰⁰ of marriage time and time again.²⁰¹ But religious protection of marriage is not absolute.²⁰² The Supreme Court unanimously upheld a Mormon’s bigamy conviction as early as 1878.²⁰³

¹⁹⁵ *Children and Teens: Statistics*, RAPE, ABUSE & INCEST NAT’L NETWORK, <https://rainn.org/statistics/children-and-teens> [<https://perma.cc/Q4RX-CJK3>] (last visited Apr. 29, 2019).

¹⁹⁶ See *supra* text accompanying notes 110–23 (discussing the role of parents).

¹⁹⁷ See, e.g., *supra* note 165 and accompanying text; Sebastien Malo, *Christie Rejects Measure to Ban Child Marriage, Citing Religion*, RELIGION NEWS SERV. (May 12, 2017), <https://religionnews.com/2017/05/12/christie-rejects-measure-to-ban-child-marriage-citing-religion> [<https://perma.cc/2U2A-PM88>] (“‘An exclusion without exceptions would violate the cultures and traditions of some communities in New Jersey based on religious traditions,’ Christie said in a statement.”).

¹⁹⁸ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (in dicta).

¹⁹⁹ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Amish children need not receive compulsory education past eighth grade because a parent’s fundamental right to free exercise of religion outweighed the State’s legitimate interest in educating its children through high school).

²⁰⁰ *Obergefell*, 135 S. Ct. at 2594.

²⁰¹ See, e.g., *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (“[Marriage] is the foundation of the family and society, without which there would be neither civilization nor progress.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, and education.”).

²⁰² See Joel A. Nichols, *Misunderstanding Marriage and Missing Religion*, 2011 MICH. ST. L. REV. 195 (2011).

²⁰³ *Reynolds v. United States*, 98 U.S. 145 (1878) (holding that religious duty is not a defense to criminal indictment of bigamy).

In *United States v. Reynolds*, the defendant argued that it was his religious duty to take more than one wife. The Court, however, was unconvinced by Reynolds' religious duty argument and upheld the congressional statute that outlawed bigamy.²⁰⁴ The Court worried that allowing the religious duty argument to empower someone to affirmatively violate a federal law would completely obliterate the structure of our democracy.²⁰⁵ While the Court recognized that Congress could not infringe on someone's freedom to exercise her religion under the First Amendment, the Court differentiated religious actions from religious beliefs.²⁰⁶

Despite the Supreme Court's express view on the matter of polygamy, religious organizations continue to distort our legal conception of marriage in the name of religious conviction.²⁰⁷ It is in these contexts that there exists a high risk of abuse within child marriage.²⁰⁸ It is also in these contexts that children are most vulnerable, and marriage with minors is most likely to be underreported or to evade the legal system since these marriages are often carried out through religious ceremonies alone.²⁰⁹ Interestingly, child marriage is a problem

²⁰⁴ *Id.* at 163–67.

²⁰⁵ *Id.* at 167.

²⁰⁶ *Id.* The Supreme Court's decision in *Reynolds* has survived on numerous occasions. See, e.g., *State v. Holm*, 137 P.3d 726 (Utah 2006) (upholding the bigamy and child abuse convictions of a thirty-two-year-old man who married his wife's sixteen-year-old sister in a religious ceremony).

²⁰⁷ See, e.g., Today, *Megyn Kelly Today: Polygamist Cult Founder's Daughter, Rachel Jeffs, Gives Her First TV Interview*, YOUTUBE (Nov. 10, 2017), <https://www.youtube.com/watch?v=Af2ygn68Pi4> [<https://perma.cc/MK8N-4XDC>] (NBC television broadcast) ("My first thought was, that I'm glad it's a young man. I was afraid I was going to marry a really old guy because we just had no choice. . . . He had two wives before me.").

²⁰⁸ *Id.*; see, e.g., *Kolbek v. Twenty First Century Holiness Tabernacle Church*, No. 10-CV-2124, 2013 WL 6816174, at *1 (W.D. Ark. Dec. 24, 2013) (upholding the accusations brought by the eight, eleven, twelve, and fifteen year old "spiritual wives" of the de facto leader of Tony Alamo Christian Ministries, who subjected the girls to frequent sexual and physical abuse). The defendant was ultimately convicted in *United States v. Hoffman*, 626 F.3d 993 (8th Cir. 2010).

²⁰⁹ *Id.* The child bride in the *Holm* case, for example, admits that even though she knew she was not civilly married, she considered herself to be married. See *Holm*, 137 P.3d at 731 ("Stubbs testified that she had worn a white dress, which she considered a wedding dress; that she and Holm exchanged vows; that Warren Jeffs, a religious leader in the FLDS religion, conducted the ceremony; that other church members and members of Holm's family attended the ceremony; and that photographs were taken of Holm, Stubbs, and their guests who attended the ceremony.").

among *all* major religions,²¹⁰ and not only, as people may believe, practiced in cults or isolated communities.²¹¹ As such, a discussion of religion in the context of child marriage is both critical and timely.²¹²

E. *Statutory Consistency*

Finally, under the legal formalism approach, advocates argue that marriage is, in essence, a legal contract, and that marriage should be reserved for adults on that basis.²¹³ As such, advocates for a total ban wonder why minors are allowed to marry when they cannot, for example, vote—promoting the idea that a state’s statutory framework should be consistent across the board with regard to minors’ rights.²¹⁴ A total ban would be beneficial if it resolves the lack of synchronicity between marital age restrictions and sexual consent laws,²¹⁵ but

²¹⁰ CBS Interview with Reiss, *supra* note 112, at 2:58 (“This is a widespread problem. Our clients come from every major religion . . . and even secular backgrounds.”).

²¹¹ While it might be true that some child marriages occur in obscure religious communities, that is not always the case. *See, e.g.*, Beitsch, *supra* note 190 (“It’s definitely not one group, one religion, one ethnicity.”); *see also* Tsui, *supra* note 4.

²¹² The current administration has been committed to religious freedom since the beginning of President Trump’s term. *See* Exec. Order No. 13798, 82 Fed. Reg. 21,675 § 1 (May 4, 2017):

It shall be the policy of the executive branch to vigorously enforce Federal law’s robust protections for religious freedom. The Founders envisioned a Nation in which religious voices and views were integral to a vibrant public square, and in which religious people and institutions were free to practice their faith without fear of discrimination or retaliation by the Federal Government. For that reason, the United States Constitution enshrines and protects the fundamental right to religious liberty as Americans’ first freedom. Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government. The executive branch will honor and enforce those protections.

²¹³ Johnson, *supra* note 165 (“‘Marriage is a legal contract and it should be reserved for adults,’ state Sen. Nellie Pou (D-Passaic), a sponsor, said in March. ‘It is startling for people to learn that there are many underage marriages happening here in New Jersey. As a state, we have a responsibility to protect our residents, and moral obligation to protect children and this bill takes the necessary steps to do that.’”); *see also* JACOBS, *supra* note 158.

²¹⁴ Gonzalo Moreno, *Setting the Age of Marriage at 18 Can Have a Huge Impact on Child Marriage*, GIRLS NOT BRIDES (Oct. 6, 2015), <https://www.girlsnotbrides.org/three-laws-that-countries-can-adopt-to-address-child-marriage> [<https://perma.cc/M933-JYJH>].

²¹⁵ *See generally* Jackson, *supra* note 29.

statutory consistency is not always appropriate. Individuals reach the requisite level of maturity for different activities at varying ages: we drive at fifteen or sixteen, we vote at eighteen, and we can purchase alcohol at twenty-one (in most states).²¹⁶ Marriage should not necessarily be lumped in with the other rights acquired at eighteen. Moreover, opponents to a total ban argue that it is not the child's age that is problematic, but rather it is being coerced into a marriage that is distressing, and that marital age reform will not succeed at preventing forced marriages.²¹⁷

Marriage is a personal decision and some flexibility within the marital age restrictions might be necessary given the countervailing concerns: "respect for tradition" and "respect for parental authority."²¹⁸ But determining the age at which a majority of a peer group is ready for marriage is a challenging and inherently arbitrary process. Some argue that individuals should not be allowed to marry before turning twenty-one,²¹⁹ others, eighteen, and others, even younger.²²⁰ There seems to be a consensus that a ten year old is too young to wed, and that some nineteen year olds are mature enough for marriage while others might not be, but choosing where to draw the line may be indiscriminate or arbitrary.²²¹ Accepting that is the first step in determining how lawmakers should legislate.

²¹⁶ See *supra* notes 90–93 and accompanying text.

²¹⁷ See, e.g., Jill Tucker, *Effort to Bar Child Marriage in California Runs into Opposition*, S.F. CHRON., <https://www.sfchronicle.com/bayarea/article/Effort-to-bar-juvenile-marriages-in-California-11268497.php> [<https://perma.cc/W5MY-RHN2>] (last updated July 7, 2017, 1:21 PM) ("The focus of efforts should be on abusive and coerced relationships, regardless of marital status, said Phyllida Burlingame of the ACLU's Northern California chapter."); Michael Reagan, *State Assembly, Planned Parenthood Won't Fight Calif. Child Marriage*, SENATOR JERRY HILL (July 12, 2017), <https://sd13.senate.ca.gov/news/2017-07-12-state-assembly-planned-parenthood-wont-fight-calif-child-marriage> [<https://perma.cc/6PV6-QL6Q>] ("[The] focus of efforts should be on abusive and coerced relationships, regardless of marital status."). However convincing, his argument has flaws considering the fact that children are more likely than adults to be forced into a marriage since children are vulnerable and impressionable to the influences of others.

²¹⁸ Wardle, *supra* note 102, at 24.

²¹⁹ Hamilton, *supra* note 30.

²²⁰ Lisa W. Foderado, *It's Legal for 14-Year-Olds to Marry. Should It Be?*, N.Y. TIMES (Mar. 13, 2017), https://www.nytimes.com/2017/03/13/nyregion/a-push-to-restrict-child-marriages-in-new-york.html?_r=1 [<https://perma.cc/NRA7-EBUH>].

²²¹ See Baldwin, *supra* note 171.

F. “A Discomfort for Blanket Rules”²²²

One of the greatest challenges to the total ban approach stems from the oversimplification of a blanket rule.²²³ Legislators are hesitant to accept such a polarizing policy.²²⁴ In some cases, it might be in a child’s best interest to marry before turning eighteen, but in other cases, it might be in a child’s best interest to wait until they are even older to marry.²²⁵ As such, some flexibility is warranted. A total ban approach will not solve all of the problems related to child marriage, like the forced marriage of girls aged eighteen or nineteen who might still fall prey to the influences and coercion of their parents to enter into an abusive marriage.²²⁶ Nor will a total ban prevent the spiritual marriage of young girls in isolated religious communities.²²⁷ And while a total ban on child marriage might initially seem like the best solution from a forum shopping perspective,²²⁸ there are other ways to achieve consistency around the United States (such as residency requirements or reverse evasion statutes).²²⁹ It is evident that the nation is not quite ready for a total ban: State legislators around the country have defeated bills purporting to raise the minimum marriage age to eighteen with no exceptions.²³⁰ Instead, narrowly tailored exceptions to the total ban should be created.

²²² See Tsui, *supra* note 113 (“[L]awmakers in many states continue to express ‘a gut level discomfort for blanket rules.’”).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See *supra* notes 188–93 and accompanying text.

²²⁶ Many of the stories on Unchained at Last’s website involve forced marriages that occurred even after a child turned eighteen. See *supra* note 47. An eighteen-year-old can be just as vulnerable as a seventeen-year-old. That is the why the ACLU (among others) refused to support the total ban bill in California. See *supra* note 217.

²²⁷ See *supra* Section II.D.

²²⁸ Not only does a total ban promote statutory consistency across the nation and, in so doing, discourage forum shopping, a total ban also undermines the need to revive marriage evasion laws. See *supra* notes 146–54 and accompanying text.

²²⁹ See *infra* Section III.D.4 (on residency requirements); *supra* text accompanying notes 155–57 (on reverse evasion statutes).

²³⁰ Total ban bills have already been struck down in a handful of states, including Florida, and only two states (Delaware and New Jersey) have adopted a total ban approach. See Comprehensive Nonage Statutes Chart, *supra* note 14.

III. EIGHTEEN WITH EXCEPTION: AN INTERIM SOLUTION

While a total ban on child marriage would solve many of the flaws in the statutory scheme outlined above, it fails to account for the legitimate interests of those who want to marry before eighteen for religious reasons, or because it is in the best interest of a mature teenager to wed (perhaps to get out of the adoption system or to leave her abusive parents' home).²³¹ The fact that a total ban has not yet achieved complete success is indicative that both Congress and state legislatures have an interest in maintaining some flexibility regarding age at marriage.²³² But something has to be done. Child marriage in the United States is an embarrassment in the context of international relations.²³³ It is hypocritical for America to criticize other countries over the prevalence of child marriage without addressing the fact that the very same problem exists within its own borders. A total ban on child marriage may be in America's future, but lawmakers are not yet ready to espouse it.²³⁴ The remainder of this Part will describe certain elements that each state should consider adopting in their respective nonage statutes as a compromise approach until a total ban on child marriage is more palatable.²³⁵

A. *Setting the Age Floor at Seventeen*

Scholars, lawmakers, and advocates have long debated the appropriate age at which an individual should be permitted to marry of their own accord. While minimum marital ages vary among the states,²³⁶ eighteen has become the generally accepted age of adulthood

²³¹ See *supra* Section II.C.

²³² See, e.g., Gov. Chris Christie, *Assembly Bill No. 3091* (May 11, 2017), https://www.njleg.state.nj.us/2016/Bills/A3500/3091_V1.PDF [<https://perma.cc/5L8B-C5PS>].

²³³ See *supra* notes 21–26 and accompanying text.

²³⁴ This is evidenced by the fact that bills promoting a total ban have continuously been watered down or vetoed by both legislators and the public. See Tsui, *supra* note 113.

²³⁵ For sample statutory language, see the Appendix *infra*.

²³⁶ See TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 30–34.

across America.²³⁷ Marriage is, and should be, one of the legal rights acquired at eighteen. But given the competing interests and deeply private, personal nature of marriage, some exceptions are warranted. These exceptions, however, should be narrowly tailored and limited to seventeen year olds when the marriage is clearly the minor's choice and in her best interest.

For a variety of reasons, seventeen is the most appropriate age floor. First, since seventeen year olds may enter the military with parental consent, a seventeen year old should also be able to marry with parental consent before being deployed.²³⁸ If a child, with the well-reasoned consent of their parent, is old enough to put their life on the line for this country, then they should also be allowed to marry (on a case-by-case basis). Second, minors in the foster care system may seek emancipation before turning eighteen.²³⁹ If a child is emancipated, and has been granted other adult rights, then that child should be able to exercise the right to marry. Third, despite the legal character of marriage, it is a deeply religious ritual to many practitioners.²⁴⁰ Since religious sensitivity is particularly poignant to the current presidential administration, some wiggle room allowing pious seventeen year olds to marry will likely go over well with state legislatures.²⁴¹ Finally, some teenagers may have already graduated high school with jobs and other adult responsibilities before turning eighteen. There is no convincing reason to prevent the marriage of a mature seventeen-year-old who wants the stability of a lifelong partner.²⁴² A strictly enforced age floor coupled with the procedural protections outlined below will ensure that it is in a child's best interest if she successfully marries at seventeen.

²³⁷ While that age fluctuates among states and varies based on the right, most adult rights are conferred on individuals upon their eighteenth birthday. *See supra* notes 90–93 and accompanying text.

²³⁸ *Are You Eligible to Join the Military?*, MILITARY.COM, <https://www.military.com/join-armed-forces/join-the-military-basic-eligibility.html> [<https://perma.cc/DK6Z-NW8M>] (last visited Apr. 29, 2019).

²³⁹ *See supra* note 188 and accompanying text.

²⁴⁰ *See supra* text accompanying notes 197–201.

²⁴¹ *See supra* note 212.

²⁴² *See Tsui, supra* note 113.

B. *Implementation Among the States*

Either the federal or state governments can implement marital age legislation, but it is most likely to succeed if spearheaded on a state-level. Federal legislation on marital age restrictions would be beneficial because a uniform age floor would also serve the legitimate federal interest of decreasing forum shopping when it comes to marriage license applications.²⁴³ While Congress is traditionally unwilling to intrude on matters of state sovereignty, like marital age, Congress has been willing to “suppress” federalism concerns when it comes to the protection of children.²⁴⁴ Despite the compelling federal interest in child protection and in preventing child marriage, the federalism concerns here are too serious to be overlooked.²⁴⁵ As such, each state should incorporate the language attached in Appendix into their nonage statutes.²⁴⁶ Requiring each state to amend their own marriage laws will be burdensome and time-consuming on grassroots advocates, but it is the best way to instigate change without infringing on the Constitution’s federalism constraints.²⁴⁷ Finally, by encouraging each state to amend their own statutes, a state can choose from the various procedural

²⁴³ Clark, *supra* note 70, at 96–97.

²⁴⁴ See, e.g., Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL’Y & L. 541, 541–44 (1998) (discussing congressional legislation enforcing child support payments on a state level). If the federal government were to spearhead marital age reform, Congress could encourage states to adopt the federal standards by incentivizing states to conform to the guidelines through a (constitutionally sanctioned) spending scheme. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (where the Supreme Court upheld a statute withholding federal funds from states that refused to raise their drinking age as a proper exercise of Congress’s tax and spending power). The method of incentivization is largely beyond the scope of this Note.

²⁴⁵ *Moe v. Dinkins*, 533 F. Supp. 623, 629 (S.D.N.Y. 1981) (“[M]arriage occupies a unique position under the law. It has been the subject of extensive regulation and control, within constitutional limits, in its inception and termination and has ‘long been regarded as virtually exclusive province of the State.’”) (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

²⁴⁶ See *infra* Appendix (based off the recently amended New York Statute, N.Y. DOM. REL. LAW § 15-a (McKinney 2017)).

²⁴⁷ Short of passing a brand new Act, there is no other mechanism within the federal government through which to make this change, and reforming the UMDA would not be a useful exercise since the UMDA does not have the force of law and has not been adopted by most states. See *Uniform Marriage and Divorce Act*, JULIA SHALHOUP: FAMILY LAW, <https://www.shalhoupfamilylaw.com/legal-updates/family-law/uniform-marriage-and-divorce-act> [<https://perma.cc/K68H-SXC2>] (last visited Feb. 13, 2018).

mechanisms outlined below and can allocate their resources in a way that best suits their needs. A state may also choose to implement a total ban on child marriage if desired.

C. *Procedural Protections*²⁴⁸

Procedural protections must be put in place to determine when a seventeen year old should be permitted to marry and under what conditions. It is crucial that these legal mechanisms effectively determine which of the marriages are genuine and truly in the child's best interest. States should have some autonomy in determining which protections fall within their state's budget, and which will be the most useful given norms surrounding child marriage in their state.

1. Judicial Consent and Training

Each state should require judicial involvement when *any* seventeen year old seeks to wed.²⁴⁹ Judges (and clerks) must be better trained in order to identify whether a child is being forced, coerced, or unduly influenced into a marriage.²⁵⁰ Mandatory forced marriage awareness training should be created by a state's social services department, which will then administer the training to judges or law clerks, who will only be entitled to approve the marriage license of a minor if they receive certification of completion.²⁵¹ Mandatory re-certification should occur at an interval set by each state. The training should alert judges to common signs that a marriage is forced or coerced, in addition to creating an open line of communication between judges and law

²⁴⁸ This Note will highlight some of the more important procedural protections that a state should put in to place. For more details, see *infra* Appendix.

²⁴⁹ This was implemented in some states, including Georgia, where marital age restrictions were amended following public outrage at the marriage between a thirty-seven-year-old woman and her son's fifteen-year-old friend that was entered in order to avoid child molestation charges. See Tsui, *supra* note 4. Currently, judicial consent is usually only required if the child is under sixteen years of age, or if a sixteen or seventeen year old's parents are unavailable. See Unif. Marriage and Divorce Act § 205(b) (1973) (judicial approval).

²⁵⁰ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 14–22.

²⁵¹ The content of the training is beyond the scope of this Note, but should be consistent with the values set forth in the TAHIRIH JUSTICE CTR. REPORT, *supra* note 4.

enforcement or social service officials when evidence of statutory rape is present. Lawful child marriage should not enable adults to evade statutory rape charges by marrying their victims.²⁵² By bridging the lines of communication between judges and local law enforcement, and by bringing marriage law, consent law, and age of majority law in sync, girls will no longer have to feel as though they have no choice but to marry their would-be rapist. Judges or clerks who fail to heed obvious warning signs that a marriage is forced or coerced should face penalty.²⁵³

2. Parental Consent

In addition to judicial consent, parental consent must be provided for any minor seeking to marry.²⁵⁴ Many states that allow minors to marry with parental consent require the permission of both parents and guardians (or one if the child only has one living parent).²⁵⁵ While parents are generally presumed to act in the best interest of their child, this becomes problematic in the context of child marriage since parents are often responsible for arranging the early marriage of their young daughters with older men.²⁵⁶ This is exacerbated by the fact that judges

²⁵² Some courts have begun to prosecute the husbands of child brides for statutory rape. See, e.g., Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1292 (2009) (when a fourteen-year-old girl became pregnant by her twenty-two-year-old boyfriend, the couple—with her parents' blessing—traveled from their home state, Nebraska, to Kansas where their marriage would be permitted. Upon return to Nebraska, where their marriage would not have been permitted, her then-husband was convicted of statutory rape and sentenced to thirty months' imprisonment). But that is not the norm. See Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2133 (1995) (stating that “prosecutions under [statutory rape] statutes are relatively rare”); see also Frontline Dispatch Podcast, *supra* note 114 (“[I]f the parties seem to be willing [and] if the parents are in favor of it, [marriage] seems to be like a reasonable solution to not prosecute the man who otherwise would be guilty of statutory rape.”). Thus, would-be convicted rapists can choose between being either a “jailbird or a groom” and “having a record or a wedding band.” See Ellen Goodman, *Orange County Has a Lot to Learn*, TIMES UNION (ALBANY), Sept. 13, 1996, at A15 (observing that marriage can be an “alternative sentence” for men who impregnate teenage girls).

²⁵³ See *infra* Appendix.

²⁵⁴ Unless a child's parents are deceased or reasonably unavailable. See *supra* note 124 and accompanying text.

²⁵⁵ See *supra* Sections I.C.3–I.C.4 (discussing parental and judicial consent).

²⁵⁶ See *supra* notes 110–17, 102–15 and accompanying text.

frequently sign off on a union that has been blessed with parental consent without conducting any further inquiry.²⁵⁷ As such, states should adopt language in their statutes that caveats parental consent: there should not be a presumption against parental consent, but judicial approval of a marriage license should not be based solely on parental permission.²⁵⁸ Moreover, parents who knowingly consent to the premature or forced marriage of their child contrary to the child's desire or best interest should be held criminally liable.²⁵⁹ This would help deter manufactured, insincere, or fraudulent parental consent.

3. Parties to the Marriage

The underage party must have an opportunity to speak privately with the judge or clerk who is tasked with approving her request for a marriage license. The interview need not be a formal evidentiary hearing, but it must be more than an introductory meeting. A judge should inquire about the tenure of the relationship and should expressly ask the underage party why she seeks to marry and if the marriage is of her own volition. Each state should institute mandatory pre-marital counseling²⁶⁰ to help acquaint the judge with the parties' extended support network.²⁶¹

4. Mandatory Waiting Periods and Residency Requirements

Each state should proscribe a mandatory, unwaivable waiting period before the marriage license is granted during which a judge must

²⁵⁷ Rebecca Beitsch, *Lawmakers in 10 States Push to Raise Marriage Age*, PBS: NEWS HOUR (May 13, 2017, 12:13 PM), <https://www.pbs.org/newshour/nation/lawmakers-raise-marriage-age> [<https://perma.cc/QV3W-FX8J>]; see also *supra* text accompanying note 131.

²⁵⁸ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 11 ("In only 2 states, NY and Virginia, does the statute expressly state that a judge's approval of a marriage cannot be based on parental consent alone.").

²⁵⁹ See *supra* note 114 and accompanying text.

²⁶⁰ See *supra* notes 38–39 and accompanying text. The counseling guidelines can be set by each state, and should, at a minimum, include a one-time meeting *before* the issuance of the license. See *infra* Appendix.

²⁶¹ This would prevent problems like those encountered in *In Re J.M.N.* See *supra* text accompanying notes 128–34.

check back in with the parties to ensure that the marriage is sincere and in the underage party's best interest.²⁶² These mandatory waiting periods can provide an opportunity for premarital counseling. Each state should also institute a residency requirement precluding the marriage of an out-of-state resident who is under the age of eighteen.²⁶³ In so doing, children will be unable to leave their home state to marry in another.²⁶⁴ Finally, states should adopt a reverse evasion law, forbidding the issuance of a marriage license to an underage party who travels to that state specifically for the purpose of evading their own state's less favorable marital age restrictions.²⁶⁵

5. Child Brides Should be Granted a Full Set of Adult Legal Rights

Raising the minimum marital age is insufficient unless married girls get a full set of adult rights.²⁶⁶ Seventeen year olds who succeed at marrying should thus be granted adult legal capacity to the extent practicable.²⁶⁷ This would solve the problem that many child brides face

²⁶² TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 22–23 (“At present, only 2 states prescribe a firm and unwaivable waiting period after an application for a marriage license involving a minor is filed and before it 22 can be issued: Arkansas (5 days) and Oklahoma (not less than 72 hours).”).

²⁶³ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 10 (“[A]s more states realize the harms of early and child marriage and legislate to close the legal loopholes that permit it, no state should issue a marriage license to an out-of-state minor.”).

²⁶⁴ “Home State” shall be defined by either the location where the minor currently resides and/or most of the relationship has taken place, or where the minor has lived in permanent residence for at least two of the five years prior to the pending nuptials. Each state can decide what is best for them.

²⁶⁵ See *supra* notes 155–57 and accompanying text (discussing marriage evasion laws).

²⁶⁶ Tsui, *supra* note 23 (“[B]ecause of their legal status as children, it is extremely difficult for minors to get help or leave an abusive relationship.”).

²⁶⁷ A child bride need not be granted the full rights of adults (e.g., the right to purchase alcohol or to vote), but she should be granted any rights narrowly tailored and rationally related to her new status as a wife, such as the ability to enter legally binding contracts, sue or be sued, apply for a work permit and maintain any income, and make decisions about her own shelter, healthcare, education, and finances. She must also have a legal path to exit or annul the marriage, including filing for divorce. See *supra* note 188 and accompanying text; see also Kathleen Michon, *Emancipation of Minors: The Ins and Outs of Minor Emancipation—What It Means and How It Can Be Obtained*, NOLO, <https://www.nolo.com/legal-encyclopedia/emancipation-of-minors-32237.html> [<https://perma.cc/84ZT-UL76>] (last visited Apr. 29, 2019).

in states where girls might be entitled to enter a marriage, but are not presumptively entitled to file for divorce, or to be housed in domestic violence shelters.²⁶⁸ It is important that this emancipated status should come *before* the marriage ceremony.²⁶⁹ Organizations that try to help child brides escape abusive relationships, like Unchained at Last, should similarly be granted exemptions from criminal charges for providing support to child run-aways.²⁷⁰ This would ensure that a child who succeeds at marrying and finds herself in a volatile or violent relationship will have the legal capacity to get out of the marriage.

6. A Shrinking Age Gap

Seventeen year olds should not be allowed to marry spouses who are more than two years older than them. Most states do not have “Romeo and Juliet” exceptions to child marriage,²⁷¹ but a reverse Romeo and Juliet exception should be adopted prohibiting the marriage of a minor to a much older spouse. States should require that a judge who grants a marriage license to a seventeen year old should consider the age of *both* the minor and adult party to the marriage. Currently, Florida requires that the spouse of a child bride be no more than two years older

²⁶⁸ *Id.*

²⁶⁹ See Letter to Oppose SB 273, *supra* note 190

Without emancipation, the minor is still, under the law, a child. Under Cal. Family Code § 7002(a), minors are automatically emancipated after marriage, but that grant of legal adulthood comes too late for a girl who, prior to the marriage, lacks the full rights and options an adult would have to prevent it from happening in the first place. Many girls will not feel safe disclosing to a court the threats they are facing, out of fear or uncertainty of the consequences to themselves or others. Emancipation before marriage offers a girl a final self-help failsafe, enabling her to leave that courtroom and keep walking to safety and an independent life of her own choosing if need be, rather than down the aisle to an unwanted marriage.

Id. at 2.

²⁷⁰ See *supra* note 68 and accompanying text.

²⁷¹ *Definition of Romeo and Juliet Laws*, LEGAL DICTIONARY (Feb. 28, 2016), <https://legaldictionary.net/romeo-and-juliet-laws> [<https://perma.cc/F29L-ZYL3>] (“Romeo and Juliet laws are clauses built into statutory rape laws in some states. These laws address situations in which two individuals who are close in age, and one of whom is not yet of legal age, engage in consensual sexual relations. The age difference allowed by Romeo and Juliet laws varies by state, though it is generally not more than five years.”).

than the child,²⁷² and Arizona sets a three-year age gap.²⁷³ Maine requires judges to consider the age of *both* parties to the marriage, but does not set a statutorily barred age range.²⁷⁴ Shrinking the age range allowable for adult spouses to marry seventeen year olds will help protect girls from marriages with spouses much older than them in which the power dynamics are extremely unequal.

IV. COUNTERARGUMENTS

A. *The Total Ban Should Go into Effect Now*

To advocates for a total ban, this proposal likely presents an insufficient response that fails to address the crux of America's child marriage problem. While some advocates might be disappointed by this proposal, allowing seventeen year olds to marry under certain circumstances should be seen as a progress. Currently, twenty-five states across the nation do not provide a minimum age at which a girl can marry.²⁷⁵ In theory, then, a girl in one of these states can marry at *any* age. While two states set their minimum marital age at eighteen, they are in the minority.²⁷⁶ Given the surprising predominance with which minors marry in the United States,²⁷⁷ and the negative factors attributed to child marriage,²⁷⁸ a strict minimum marital age floor is necessary, but it need not be set at eighteen. If adopted, an age floor at seventeen would prohibit all fifteen and sixteen year olds from marrying, which would be a tremendous accomplishment. While this Note's proposal may not be idealistic, it is realistic.

²⁷² FLA. STAT. ANN. § 741.04 (1)(b) (West 2018).

²⁷³ ARIZ. REV. STAT. ANN. § 25-102(A)(2) (2018).

²⁷⁴ ME. REV. STAT. ANN. tit. 19-A, § 652(8)(B) (2019).

²⁷⁵ TAHIRIH JUSTICE CTR. REPORT, *supra* note 4, at 32–34 (appendix comparing each state's marriage law as of October 2017).

²⁷⁶ See Comprehensive Nonage Statutes Chart, *supra* note 14.

²⁷⁷ See *supra* notes 6–10 and accompanying text.

²⁷⁸ See *supra* notes 28–46 and accompanying text.

B. *Girls Younger than Seventeen Should Be Able to Marry*

Opponents to this proposal might also argue that seventeen is too old, and that sixteen or fifteen year olds should also be allowed to marry on occasion. While there might be some circumstances in which the marriage of a sixteen year old is desirable, those few scenarios are outweighed by the duress under which most marriages—including a party under the age of seventeen—percolate.²⁷⁹ By establishing an age floor at seventeen, the amended statutes will help protect the most vulnerable group: girls sixteen and younger.²⁸⁰ Even if a fourteen-, fifteen-, or sixteen-year-old girl is pregnant and plans to keep and raise the baby, marrying the baby's father might still be unadvisable.²⁸¹ Moreover, the arguments for allowing children to marry before they reach the age of eighteen are strong, but not strong enough to entirely countervail an age floor at seventeen.²⁸² If a minor is serious about marriage, they can wait until they turn seventeen, at which point the union will have to survive additional procedural mechanisms before a marriage license is granted.

C. *Religious Liberty Sentiment*

Proponents for a total ban on child marriage cite heinous cases of abuse among obscure religious communities as evidence that minimum marital ages must be raised,²⁸³ but cases like these are uncommon and

²⁷⁹ 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/ZE24-MWS3].

²⁸⁰ See Tsui, *supra* note 4; *Florida: Child Marriage Ban Hits a Bump*, HUM. RTS. WATCH (Feb. 5, 2018, 5:43 PM), <https://www.hrw.org/news/2018/02/05/florida-child-marriage-ban-hits-bump> [https://perma.cc/U8M9-5SGE] (“Girls who marry as early teens—before age 16—in the US are 31 percent more likely to end up in poverty later in life.”).

²⁸¹ While there is no hard data to support this, there is anecdotal evidence that suggests that marriage at such a young age is detrimental despite pregnancy. Comprehensive Nonage Statutes Chart, *supra* note 14, at 1 (“Lax statutory exceptions based on . . . pregnancy (which can be evidence of rape) can actually facilitate forced marriages and often leave older minors especially unprotected.”); As of October 2018, pregnancy expressly lowered the minimum marital age in seven states (and implicitly in others). See *id.* at 2.

²⁸² See *supra* discussion in Part II.

²⁸³ See *supra* notes 207–09 and accompanying text.

not easily prevented by raising the minimum marriage age (since spiritual or sister wives are not typically legally married to their husbands anyway).²⁸⁴ While some states, like Utah, do consider religious marriages within the scope of their bigamy law,²⁸⁵ it is doubtful whether a total ban on child marriage would protect girls who find themselves trapped in marriages in isolated communities where the horrific abuse child brides experience is shielded by a veil of religiosity. Much more is needed to protect these young girls than marital age reform,²⁸⁶ but strengthening nonage statutes would, at the very least, signify the gravity of child marriage and Congress's legitimate interest in preventing the practice.²⁸⁷

D. *The Procedural Protections Are Costly*

Some people might object to this solution because the resources needed to effectively train judges and administrative clerks are both costly and time-consuming. While that may be true, the cost is worth incurring for two reasons: (1) the cost of implementation will be relatively low;²⁸⁸ and (2) the financial burden that a bad marriage places on the state could be higher.²⁸⁹ Marital age restrictions as currently implemented are outdated and the need to amend nonage statutes outweighs any nominal cost that might be incurred in the process.

²⁸⁴ Fraidy Reiss, *The Washington Post*, *Why Does the United States Still Let 12-Year-Old Girls Get Married?*, DENV. POST (Feb. 11, 2017, 9:22 AM), <https://www.denverpost.com/2017/02/11/why-does-the-united-states-still-let-12-year-old-girls-get-married> [https://perma.cc/5HHR-PKHK].

²⁸⁵ *State v. Holm*, 137 P.3d 726, 733 (Utah 2006) (“We hold that the term ‘marry,’ as used in the bigamy statute, includes both legally recognized marriages and those that are not state-sanctioned because such a definition is supported by the plain meaning of the term, the language of the bigamy statute and the Utah Code, and the legislative history and purpose of the bigamy statute.”); *see also* *Brown v. Buham*, 822 F.3d 1151 (10th Cir. 2016).

²⁸⁶ *See supra* note 217 (marital age reform will not necessarily prevent abusive or coercive marriages).

²⁸⁷ *See generally* TAHIRIH JUSTICE CTR. REPORT, *supra* note 4.

²⁸⁸ Advocacy groups will likely be eager to help create a curriculum for states to adapt, and, once created, training can be limited to a predetermined timeframe.

²⁸⁹ *See supra* notes 30–40 and accompanying text (discussing the financial burden caused by child marriage).

CONCLUSION

A lot of ink has been spilled discussing the merits of a total ban on child marriage, but a total ban is simply not practical at this time.²⁹⁰ Politicians are hesitant to uproot decades of family law in favor of a one-size-fits-all solution, but nonage statutes are outdated and inconsistent with contemporary cultural mores.²⁹¹ The best way to end child marriage is to encourage each state to amend its marital age restrictions. Legislative reform should account for both the vulnerability of children to fall prey to forced or premature marriages in addition to respecting the decision of a mature seventeen year old to wed. Setting the minimum marriage age at eighteen—with exceptions for some seventeen year olds—is a temporary solution that can remain in place until some time in the future when a total ban of child marriage is more palatable with state legislators. This compromise approach may not fully please all advocates, but it is a step in the right direction.

²⁹⁰ See *supra* note 230 and accompanying text.

²⁹¹ See *supra* notes 54–63 and accompanying text.

APPENDIX

EIGHTEEN WITH EXCEPTION: A marriage or civil union license shall not be issued to a minor under the age of seventeen years old. The right to marry may be exercised independently on or after an individual's eighteenth birth date. If a party lies about their age on a marriage application license, she shall be guilty of perjury and penalized accordingly.

JUDICIAL CONSENT: In order to give judicial consent to the marriage of a minor, a judge or clerk must complete forced marriage awareness training. A judge must not treat evidence of parental consent or of pregnancy as presumptive evidence that the marriage is in the underage party's best interest. A reasonably prudent judge who fails to heed signs that the marriage is forced or coerced will face misdemeanor charges and shall be fined for a small monetary sum if convicted.

MANDATORY WAITING PERIOD: There must be a minimum three day waiting period between the application for a marriage license by a minor and the issuance of said marriage license, during which time a judge or city clerk should make a reasonable effort to contact the minor's parents or legal guardians and shall interview the parties. The waiting period may not be waived.

INTERVIEWING THE PARTIES: A judge or clerk must interview the underage party and her prospective spouse separately. A judge must specifically ask the minor if she is freely choosing to marry, and must explain to her the significance of her new adult legal status. A judge or clerk's decision to approve the marriage license of a minor should be made in accordance with: the best interest of the minor; the wishes of the minor and the minor's parents or legal guardians; the mental and physical health of both individuals to be married; the criminal history of the individuals seeking to be married; whether the proposed marriage would violate any other state laws; and any such other information which the court deems appropriate.

PARENTAL APPROVAL: Parental consent must be provided for any minor seeking to marry. Parental consent alone will not be sufficient for a

judge to approve the marriage of an underage party. Parents who knowingly consent to the marriage of their child contrary to the child's desire or best interest will be held criminally liable for child abuse or the equivalent state offense.

RESIDENCY REQUIREMENT AND REVERSE EVASION RULE: States may only grant marriage licenses of children aged seventeen whose permanent residence is within that state's borders. The minor must furnish legitimate, state-issued official proof of age. States may not issue a marriage license to a minor who is unable to marry in their home state.

PREMARITAL COUNSELING: The couple must undergo pre-marital counseling on at least one occasion prior to the nuptials. The counseling guidelines can be set by each state, and should, at a minimum, include at least one meeting with a state official before the issuance of the marriage license.

CHILD BRIDES SHOULD BE GRANTED ADULT LEGAL RIGHTS BEFORE THE MARRIAGE: The legal status of a minor who marries is akin to that of an emancipated minor. She shall be able to enter legally binding contracts, sue or be sued, apply for a work permit and maintain any income, make decisions about her own shelter, healthcare, education, and finances. She must have a legal path to exit or annul the marriage, including filing for divorce. This emancipated status must be granted to the minor before the issuance of the marriage license and the marriage ceremony. If the minor does not go through with the marriage, the emancipated status is nullified.