

BEYOND FORCE: EVALUATING NON-CONSENSUAL MARRIAGE UNDER US LAW

Kelsey Lee, Esq.

PhD Thesis

2025

School of Law, Trinity College Dublin, the University of Dublin

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

I agree to deposit this thesis in the University's open access institutional repository or allow the Library to do so on my behalf, subject to Irish Copyright Legislation and Trinity College Library conditions of use and acknowledgement.

I consent to the examiner retaining a copy of the thesis beyond the examining period, should they so wish (EU GDPR May 2018).

Kelsey Zee

ABSTRACT	4
INTRODUCTION.....	5
PART I: FOUNDATIONS FOR EXAMINING MARITAL CONSENT	9
1.1 METHODOLOGY.....	9
<i>Integrated Policy Analysis</i>	9
<i>Sources and Limitations</i>	11
<i>Disclosures on Terminology.....</i>	15
<i>Positionality.....</i>	17
1.2 DEBATING THE DEFINITION OF “FORCED MARRIAGE”	19
<i>Forced Marriage as the Absence of “Full and Free Consent”</i>	19
<i>Forced Marriage as a Result of Duress/Coercion</i>	22
<i>Child Marriage as Forced Marriage</i>	24
<i>Forced Marriage as a Unique Crime</i>	25
<i>Forced Marriage as Human Trafficking</i>	26
<i>Forced Marriage as a “Cultural” Issue</i>	27
1.3 LIMITS ON THE UNDERSTANDING OF NON-CONSENSUAL MARRIAGE IN THE US	36
<i>Consent as Americanism</i>	37
<i>Marriage Practices as Justification for Minority Exclusion</i>	42
<i>Non-Consensual Marriage as a Solution to “Unwed Motherhood”</i>	48
<i>Conclusions</i>	53
1.4 THE RIGHT TO MARRY AND CONSTITUTIONAL CONSIDERATIONS	55
<i>Due Process and Equal Protection under the US Constitution</i>	55
<i>Evolution of the Fundamental Right to Marry/Marriage</i>	64
<i>Conclusions</i>	71
1.5 THEORIES OF CONSENT	75
<i>Consent in Ethics</i>	76
<i>Consent in Contract.....</i>	81
<i>Paternalism and Consent</i>	87
<i>Application to Marital Consent</i>	90
<i>Conclusions</i>	94
PART II: CAPACITY TO CONSENT TO MARRIAGE.....	96
2.1 CHILDREN	98
<i>Background on Children’s Rights and Decision-Making Capacity</i>	99
<i>Child Marriage Laws Across the US</i>	106
<i>Laws Related to Child Marriage</i>	122
<i>Conclusions</i>	127
2.2 PERSONS WITH MENTAL DISABILITIES	133
<i>Background on Disability Rights and Decision-Making Capacity</i>	134
<i>Current law on Marital Consent and Mental Disability</i>	138
<i>Laws Related to the Marriage of Persons with Mental Disabilities</i>	144
<i>Conclusions</i>	151
PART III: CONDITIONS THAT INVALIDATE CONSENT	156
3.1 FORCE, DURESS, AND COERCION	156
<i>Force/Duress/Coercion and Marriage in US Criminal Law</i>	157
<i>Force/Duress/Coercion and Marriage in US Family Law.....</i>	160
<i>Defining Terms Under Current Laws</i>	164
<i>Conclusions</i>	178
3.2 FRAUD	184
<i>Fraud and Marriage in US Family Law.....</i>	185
<i>Fraudulent Inducement to Marriage</i>	186
<i>Fraud and Marriage in US Benefits Law</i>	193
<i>Conclusions</i>	201
3.3. WITHDRAWAL OF CONSENT	205
<i>The Right to Exit</i>	205
<i>The Right to Divorce</i>	209

<i>Conclusions</i>	217
FINAL CONCLUSIONS AND RECOMMENDATIONS	218
<i>The Need for Concrete Definitions</i>	218
<i>Revising Legislation on Marriages of Persons with Limited Capacity</i>	221
<i>A Broader Understanding of Marital Consent</i>	226
STATUTE COMPENDIUMS	228
<i>A: Marriage Age Exceptions</i>	229
<i>B: Annulment Based on Infancy</i>	235
<i>C: Ordinary and Automatic Marriage Emancipation of Minors</i>	239
<i>D: Marital Rape Exceptions for Infancy and Incapacity</i>	246
<i>E: Forced Marriage Criminal Laws</i>	253
<i>F: Marital Restrictions Based on Mental Disability</i>	254
<i>G: Annulment Based on Force and Fraud</i>	259
ANNEX: ATTORNEY GENERAL OUTREACH	264
BIBLIOGRAPHY	266

Acknowledgements

I wish to extend a sincere thank you to Professor Patricia Brazil for her support and supervision throughout this project, as well as Professor David Prendergast for his interim supervision. I would also like to thank the Honorable Judge Margaret deGuzman and Professor Sarah Katz for their mentorship throughout my legal education and career. I am deeply grateful to my friends and family for their encouragement and a special thank you to Melanie Sallis, whose support in this project was invaluable. Finally, to my grandmother Anita Allen, who changed the future of her family through her commitment to education: this project is dedicated to you.

ABSTRACT

This thesis explores the evolving relationship between consent and marriage law in the United States. While there is much discussion of the so-called “forced marriage” in America, there is no universal definition of forced marriage and almost all legal intervention focuses on racial and religious minorities. In response, this thesis employs Interpretative Policy Analysis to expand the scope of this discourse and explore “non-consensual marriage”, a far broader and more nuanced concept than the narrowly defined “forced marriage”. This examination starts with a review of the limited research on forced marriage and marital consent, as well as the potential reasons for this myopic focus in the US. Next, the spectrum of non-consensual marriage is explored including where a spouse 1) lacks capacity to consent, 2) gives consent invalidly, or 3) withdraws consent. Finally, it proposes both definitional and legislative changes that will lead to a more comprehensive and concrete landscape on which we can evaluate marriage and consent. The result of this extensive inquiry is the first large-scale evaluation of the meaning and scope of marital consent in the US.

INTRODUCTION

Marriage is rarely conceptualized as merely the conveyance of a marriage license: it holds a unique place in the popular imagination as a legal, social, and interpersonal institution of particular, almost holy, importance. This attitude was summarized in a recent ruling by the US Supreme Court, where Justice Kennedy declared, “No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family. In forming a marital union, two people become something greater than they once were.”¹ The extreme reverence for marriage exhibited by lawmakers, judges, and the general public is not often well-explained; the fundamental importance of marriage is taken for granted and rationale for this reverence need not be justified. With this deep belief in the social good of marriage comes another corollary assumption: people *want* to get married, and society should encourage that desire. This “want” to be in the marital relationship can be described as “marital consent”, what shall be referred to throughout this thesis as consent to into and/or remain in a marriage.

Despite the idyllic vision of marriage held by many, the existence of marriages where marital consent is lacking, or has been procured wrongfully, has increasingly entered the public consciousness. The past several decades have seen an increase in concern about so-called “forced marriage” from both researchers and governmental actors. These marriages are envisioned as those lacking the “full and free” consent of both parties, what is more concretely define throughout this thesis as “non-consensual marriage.” While US federal and state governments have directed some attention at non-consensual marriage outside of the US, as well as within minority communities within the country, they have done little to critically examine marital consent and how it is at play within US marriages. Accordingly, this thesis seeks to conduct an extensive inquiry of the meaning and scope of marital consent in the US.

Part I lays out the foundations for this assessment of non-consensual marriage. Chapter 1.1. outlines the methodological framework of the thesis and explains the rationale behind the use if Interpretative Policy Analysis throughout this research.

Next, in Chapter 1.2, “forced marriage” as currently defined in the exiting literature is thoroughly examined, and it is concluded that there are significant gaps in research on the definition and

¹ *Obergefell v Hodges* (2015) 576 US 644 (US Supreme Court).

boundaries of non-consensual marriages. It is also noted that the existing discourse on the issue, both in the US and internationally, focuses almost entirely on forced marriage as a “cultural issue”, largely originating from the MENASA region.

Accordingly, in Chapter 1.3, a deep historical assessment is undertaken to determine the reasoning behind this limited conceptualization of forced marriage in the US. This research identifies three primary reasons for the US government and populace’s myopic focus on “cultural communities”: 1) limited views of “consent as Americanism” through US history, 2) the intentional “othering” of minority communities through criticisms of marital practices, and 3) the use of marriage as a tool to prevent unwed motherhood, even amongst unwilling spouses.

Having evaluated the historical landscape of forced marriage discourse in the US, Chapter 1.4 provides a background on the standing of the so-called “right to marry” under current US Supreme Court jurisprudence, identifying again severe definitional issues with the concept. This context will be essential for an understanding of the potential constitutional ramifications of marriage capacity restrictions that shall be discussed in later chapters.

Rounding out the background information provided in Part I, Chapter 1.5 broadens the theoretical inquiry into marital consent by looking at the understanding of consent in a wider variety of settings, including ethics, contracts and sexual relations. The result is a framework by which we can understand the US laws related to marital consent that are explored in Part II.

Part II assesses marital consent and capacity. Through US law, there are three primary groups that legislators have identified as having limited capacity to consent to marriage: children, persons with mental disabilities, and intoxicated parties. This thesis will focus on the former two categories. Intoxication is a temporary state; this varies significantly from infancy, which lasts from birth until the age of legal majority (generally 18), or mental disability, which can be lifelong. Therefore, the effects on intoxication on the giving of marital consent so temporary as to be of little usefulness to this assessment, which aims to observe the effect of marital consent law on populations of limited capacity in a broader and more detailed way.

Chapter 2.1 focuses on child marriage in the US, providing a deep analysis of the many marital age exceptions allowing for these marriages across US states and their corollary laws, namely

marital rape exceptions for married parties and auto-emancipation for married children. The chapter also provides a detailed examination of the legislative debate on the elimination vs. maintenance of such laws in the modern era.

Chapter 2.2 turns to the complex matter of marital consent for persons with mental disabilities, a group that is far less easily defined than children. A legislative assessment of laws reveals the extent to which persons with mental disabilities can consent to marriage under current state systems. The chapter also explores the patchwork of corollary laws, including marital rape exceptions and termination of State benefits, which can have significant impact on such parties.

Part III turns attention away from the conditions affecting the capacity to consent to marriage to conditions that will invalidate consent, even when given by a party of full capacity. Chapter 3.1 begins this overview by parsing out the language of “forced marriage” statutes, looking at the ancillary terms “duress” and “coercion” in great detail to obtain a level of specificity that is sorely lacking in existing legislation. It is concluded that the term “force” is actually ill-suited to the context of marriage and instead argued that new terminology be adopted, namely the terms “duress-based marriage” and “coercion-based marriage”.

Chapter 3.2 then addresses the relationship between fraud and marriage, both as fraud to induce a marriage and fraud as a perceived tool to wrongfully receive a marital benefit. While much attention has been given to the latter understanding of fraud in recent discourse, this thesis argues that the former understanding should be of greater concern when we speak of conditions invalidating marital consent.

Finally, Chapter 3.3 addresses an area that is significantly overlooked in existing non-consensual marriage research: withdrawal of consent. It does this by assessing both the so-called “right to exit” in the context of the family, as well as the proposed “right to divorce” and its relationship to no-fault divorce in the US. It is concluded that in the face of recent pushback against no-fault divorce legislation, divorce must be staunchly protected as a method for parties to withdraw their consent from marriage and exercise their right to exit such unions.

Through this research, this thesis arrives at several conclusions and recommendations. First is the dire need for concrete definitions within the discourse on non-consensual marriage, as it is

identified that a lack of clarity in terminology as a major factor in the confusion and seeming ineffectiveness of legislation throughout the US. Several terms are therefore proposed in the effort to provide clarity and specificity for future research including: “marital consent”, “non-consensual marriage”, “limited capacity marriage”, “duress-based marriage”, “coercion-based marriage” and “fraud-based marriage.” While these terms are applied specifically in the context of the US for purposes of this evaluation, the hope is to expand their use into a more general inquiry of non-consensual marriages globally.

Next, the thesis concludes that existing US marital consent capacity restrictions for parties of limited capacity (including children and persons with mental disabilities) are in need of significant revision. As these laws stand, they are both under-protective of vulnerable persons and conversely overly paternalistic in their approach. It is therefore recommended the modification of such laws to set a brightline standard against the marriage of children and a revised capacity-assessment procedure for persons with mental disabilities seeking to marry.

Finally, the thesis reflects on how the limited understanding of marital consent has led to the stereotyping of minority communities and the overlooking of victims of non-consensual marriage within “traditional” American society. It is therefore concluded should be turned away from *who* induces non-consensual marriages to *how* such inducement is achieved. The result of this project is a new benchmark in the understanding of non-consensual marriage and a roadmap for change on this important issue within the US and beyond.

PART I: FOUNDATIONS FOR EXAMINING MARITAL CONSENT

1.1 Methodology

This chapter outlines the methodology applied throughout this thesis, as well as the sources consulted for this research. Further, it makes specific disclosures on research limitations (both doctrinally and personal to the author) and clarifies key terminology used throughout this analysis. This thesis does not attempt to gather quantitative data on incidents of forced marriage, nor does it provide a sociological assessment amongst the US population. The decision to avoid new quantitative data gathering was intentional. One of the primary issues with “forced marriage” research identified through this thesis is a critical lack of definitions that make clear what types of marriage practices fall under this umbrella term. As shall be discussed in the next chapter, the result of this failure in terminology has led the existing quantitative research to rely on extremally limited data sets with largely unclear parameters for research subjects.

Instead, the thesis attempts to assess from a legal perspective how marital consent is conceptualized by the US government and states in an attempt to arrive to more concrete definitions of the “forced marriage” phenomenon. It accomplishes this by employing Interpretive Policy Analysis, focused on the examination of relevant legal doctrine, historical records, case law, and legislative transcripts. The reasoning behind this approach is two-fold: 1) it takes into account the often highly emotional legislative process behind family law and 2) it addresses the author’s close personal and professional relationship to the subject.

Integrated Policy Analysis

Integrated Policy Analysis (IPA) combines multiple methodologies, perspectives, and disciplines to address complex, multi-dimensional policy issues.² IPA creates a lens by which we can view a variety of quantitative and qualitative research, looking holistically at theoretical frameworks, data sources, and stakeholder perspectives. This approach is based on the assumption that there are multiple interpretations of policy issues, and seeks to uncover the underlying beliefs, values, and feelings that shape these interpretations.³ IPA often involves incorporating the perspectives

² See eg. D Yanow, *Conducting Interpretive Policy Analysis* (Sage 2011).

³ See I Bacik, ‘Developing an Understanding of “Compromised Consent”: How Reconsideration of Consent as a Legal Concept May Inform a Feminist Theoretical Framework for the Introduction of “Nordic Model” Prostitution

of those who have direct experience with the policy issue, in order to gain a more nuanced and context-specific understanding of its effects. The goal of IPA is to provide a more comprehensive, holistic understanding of policy problems and solutions.⁴

IPA recognizes the interdependencies within systems and looks at the influence of various stakeholders, including policymakers, affected communities, interest groups, experts, and the general public, that underly specific legislation.⁵ By viewing policy issues within a broader context, IPA takes into account the historical, cultural, political, and socioeconomic factors that shape issues and frame potential solutions. This context-specific understanding is essential for developing an understanding of policies that is relevant and practical in real-world settings. By integrating multiple methodologies and perspectives, IPA allows analysts to capture both the breadth and depth of a problem, making the analysis more robust and inclusive.

The contextual approach of IPA helps researchers explore the “human” element of policymaking, by viewing lawmakers as individuals with unique concerns, values, and priorities driven by their environment and subjective understanding of societal issues. IPA allows for the identification of interconnections between different factors and the individual biases and motivations of stakeholders. As Yanow summarizes, “The central question, then, for interpretive policy analysts is, how is the policy issue being framed by the various parties to the debate?”⁶

IPA is a particularly useful methodological framework in the context of researching a highly emotive area of law. Legislators, legal professionals, law enforcement, and the general public are guided by a wide variety of personal views and experiences which color opinions on various laws and policies. As summarized by Sanger, “It is clear that emotion is threaded throughout the process of law making: motivation, planning, deliberation, judgment, negotiation, voting, and its aftermath are all emotionally inflected.”⁷ Legislators, lawyers, and even judges cannot be expected to completely disregard their internal moral compasses when faced with challenging

Laws and Did Inform the Motivations of Lawmakers in Ireland’ [2022] PhD Thesis: School of Law, Trinity College Dublin at 67-68.

⁴ See eg. K Bartels, ‘Using Interpretive Policy Analysis (IPA) to Drive Positive Change’ [2021] University of Birmingham; A Durnová, ‘Making Interpretive Policy Analysis Critical and Societally Relevant: Emotions, Ethnography and Language’ (2022) 50 Policy and Politics 43.

⁵ See generally Yanow (n 2).

⁶ *ibid* at 93.

⁷ C Sanger, ‘Legislating with Affect: Emotion and Legislative Law Making’ (2013) 53 American Society for Political and Legal Philosophy 38 at 45.

legal choices. For example, it is well-established that emotional reactions, namely disgust, have a strong impact on policies in criminal law.⁸ There are a myriad of examples where legislatures nationwide respond to a “moral panic” surrounding a particular issue, sometimes largely out of proportion with the issue itself.⁹ While in an idealized system, lawmakers and legal professionals might make choices primarily on the basis of confirmed data, the reality is that emotional responses are a significant, and in some cases the *most* significant, aspect of policymaking decisions.

Perhaps more than any other policy area, the regulation of the family, including marriage, children, and domestic violence, invokes highly subjective, and often highly emotional, arguments.¹⁰ As much of the research in this thesis will demonstrate, family law across US history has often been drafted more to reflect the individual morals and perceptions of legislators than to address hard data and sociological analysis. With an understanding that emotional and personal experiences are significantly at play in the creation and enforcement of family law, what this thesis attempts to uncover is how these influences manifest through the laws on marital consent throughout the US. IPA is a particularly useful framework from which to conduct this analysis, as it prioritizes a contextual understanding of the law, rather than a pure textual approach. IPA helps us to examine the ideological roots of policies related to the family law, as much of the language of the laws themselves cannot encapsulate the range of this paradox.

Sources and Limitations

At the outset of this research, it was determined that information would be collected from all 50 US States.¹¹ This process was intentionally broad, as the primary aim was to create a picture of how marital consent is viewed in the United States broadly. By observing statutory language, legislative arguments, and scholarly discourse on marriage in all states, this thesis attempts to

⁸ See eg. D Kahan, ‘The Anatomy of Disgust in Criminal Law’ (1998) 96 Michigan Law Review 1621; see also Sanger (n 7).

⁹ See eg. Sanger (n 7) (discussing widespread legislation on programs such as “infant drop boxes” and mandatory ultrasounds for women seeking abortion, despite little statistical on their effectiveness and significant public pushback.)

¹⁰ See generally J Carbone and N Cahn, ‘Family Law and Emotion’ in S Bandes and others (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Ltd 2021).

¹¹ US extrajudicial territories and the District of Columbia were excluded from this evaluation, as these jurisdictions do not follow the same state-legislative processes as the other 50 states. In addition, these jurisdictions have not been included in the bulk of literature on non-consensual marriages within the US (importantly, quantitative data gathering), and this thesis wanted to ensure that the statutory analysis was consistent with the scope of research used to inform this project.

extract and examine common themes and ideologies amongst stakeholders in the field of non-consensual marriage. This comprehensive scope is especially important in the context of the US, where the Uniform Marriage Act doctrine of comity dictates that individuals from one state are permitted to marry in any other state, and a legal marriage from any other state will generally be fully recognized in all other states.¹² In essence, this means that the marital law of just one state can potentially affect citizens of any state. It was therefore critical to include all states into this analysis. Furthermore, it proved impossible to find “model states” that were representative of certain trends in legislation. No obvious pattern in marital laws emerged in the research based on states’ geographic location, population, racial/ethnic diversity, or political breakdown. As shall be discussed in the next chapter, this thesis launches stark criticism at research that limits scope to arbitrary focus areas and it was thus determined to make the research broad in its scope.

Viewed through an IPA systems-oriented and contextual lens, the following sources have been surveyed for this thesis:

Statutes

This thesis compiles and categorizes statutes related to the following areas related to marital consent: marriages under the age of legal majority (Compendium A), annulment for persons married under the age of legal majority (Compendium B), emancipation by court order or through marriage (Compendium C), minimum age of sexual consent (Compendium D), marital exceptions for sexual assault of minor (Compendium D), marital exceptions for sexual assault of persons with mental disabilities (Compendium D), criminal laws related to forced marriage (Compendium E), restrictions on marriage of persons with mental disabilities (Compendium F), annulment for persons with mental disabilities (Compendium F), annulment for a showing of force to induce marriage (Compendium G), annulment for a showing of duress to induce marriage (Compendium G), and annulment for a showing of coercion to induce marriage (Compendium G).

The statutory law indexes compiled for this project are now the most extensive available compendiums of statutes related to consent and marriage in the United States. For each category of laws, there is an evaluation of overall legal trends, as well as an interpretation the origin and

¹² B Bix, ‘State Interests in Marriage, Interstate Recognition, and Choice of Law’ (2005) 38 Creighton Law Review 337.

meaning of the statutory language. Whenever we seek to evaluate statutory language, we must acknowledge the role of canons of interpretation. Where possible, the common canons of construction have been referenced and applied to the relevant statutory law. Most notably, this thesis employs the canon of *verba cum effectu sunt accipienda*: the surplusage canon. This canon dictates that “If possible, every word and every provision is to be given effect... None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”¹³ This is of particular interest in the language of the family law, as we shall see that many of these statutes use seemingly duplicative and redundant language, without additional clarification or definition of terms.¹⁴ To the extent possible, this thesis attempts to parse out the meaning of this language in accordance with the canon *verba cum effectu sunt accipienda*, giving each term its own individual significance.

However, in interpreting statutory language, this thesis also moves beyond the confines of such canons of construction. Statutory language is highly context-dependent, and an IPA approach dictates that such context be at the forefront whenever reading such text. In addition, while state legislatures generally do have offices of legal counsel to assist in the drafting of statutory language, it is possible, and indeed as we will see throughout this research, probable, that certain texts are duplicative, irrelevant, or otherwise contrary to the canon of interpretation. Where such issues exist, they have been noted and attempts have been made to assess reasons behind these inconsistencies.

Case law

For each topic, an extensive review of relevant case law has been conducted. This case law helps to shed light on the application of the statutory law by family law judges, as well as in some areas clarifying the statutory language in a real-world context. The majority of the surveyed case law comes from the US Supreme Court, lower federal courts, and state Supreme courts.

One of the primary challenges throughout research for this thesis is the limited publicly available information on state-level family law cases. Family law is primarily decided in the US at the local (rather than federal) level, so the bulk of case law is created by county family law judges.

¹³ A Scalia and B Garner, ‘Reading Law: The Interpretation of Legal Texts’.

¹⁴ This issue is addressed more extensively in Chapter 3.1 on “force, duress, and coercion” language in marital law.

There are over 3000 counties within the US, making direct contact with each of these courts impracticable.¹⁵ Furthermore, in many counties, it is common practice to seal family law records entirely, allowing for their release only to the parties or their direct legal representatives. It is not possible to conduct a widespread precedent review even for unsealed cases, as family court matters generally do not receive a public judicial opinion unless they reach an appellate court, which is exceedingly rare. To overcome this hurdle, this research relied on materials created by state-level family law practitioners to ascertain local trends and have noted throughout the thesis where secondary practitioner sources were consulted.

Legislative history

A primary aim of this thesis is to ascertain the reasoning behind marital law; thus, a wide range of legislative history was surveyed for this project. These sources included statements by legislators in committee and in general voting sessions and gubernatorial statements. Such records are publicly available through recordings and/or transcripts of legislative hearings and archived records of gubernatorial statements. In addition, statements by policymakers given to media outlets have also been consulted. These sources give invaluable insight into the motivations of policymakers in creating, supporting, and/or opposing legislation related to marital consent. The reasoning for limiting legislative history research to publicly available materials is discussed below.

Historical documentation

In order to give a broader contextual perspective to arguments on marital consent, a variety of historical documents were included in this research. These include newspaper and other media reports, records of public meetings, statements by historical stakeholders in the area of marital law, and a variety of other materials that are cited throughout this thesis. Given this thesis' aim to broaden the collective understanding of marital consent, historical source review was not limited to the area of non-consensual marriage. Rather, sources related to a wide variety of topics were consulted, including the progression of children's rights, disability rights, women's rights, domestic violence prevention, and immigrant justice.

¹⁵ 'States, Counties, and Statistically Equivalent Entities' (US Census Bureau)
<<https://www2.census.gov/geo/pdfs/reference/GARM/Ch4GARM.pdf>> accessed 13 March 2025.

Theoretical discourse

While this thesis attempts to focus on the “real world” applications of marital law, it was also necessary to include in this research an extensive inquiry on the theoretical foundations of consent, both in family law and beyond. Without first exploring the ideological parameters of consent, as theorized by a wide variety of scholars, it would be impossible for this thesis to address one of its primary research questions: what level of consent should be considered sufficient to be deemed valid for marriage? Chapter 1.4 therefore extensively reviews the available theoretical literature on consent, both as applied to marriage and as a broad philosophical and legal concept.

Disclosures on Terminology

Gender and sexual orientation

It is essential at the outset of any exploration of marriage and family law to discuss the element of gender. As will be evidenced throughout this research, the issue of marital consent is a topic that is integrally linked to the pervading gender norms accepted by both political actors and the general public. The imposition of “traditional” heteronormative structures onto the family system, particularly when related to pregnancy, are evident throughout the historical doctrine and in today’s modern law. While marital consent is an issue that affects both men and women, it is undeniable that gender plays a significant role in either empowering or disenfranchising a would-be spouse. What quantitative data exists in the field indeed signals that gender is a major factor in non-consensual marriage. For example, as of 2015, 85% of married children were minor girls married to adult men.¹⁶

Accordingly, this thesis uses the terms “women” and “girls” (women under the age of 18) largely to refer to cisgendered females that have been socialized as women. Conversely, “men” and “boys” (men under the age of 18) are used to refer primarily to cisgendered males, socialized as men. These categorizations are not intended to discount the experiences of non-cisgendered (including, transgender, nonbinary, and intersex) persons, who have undoubtedly also been affected by issues surrounding marital consent. Indeed, one motivation for non-consensual marriage is to push LGBTQI+ individuals into a heterosexual marriage to suppress the

¹⁶ Unchained At Last, ‘Forced/Arranged/Child Marriage’ <<https://www.unchainedatlast.org/about-arranged-forced-marriage/>> accessed 21 February 2024.

individuals' gender expression and to force conformation to gender-normative family roles.¹⁷ However, given the scope of this research, gendered terminology should largely be read as referring to cisgendered women or men.

It is also important to note that throughout this research, the term “forced marriage”, or more aptly non-consensual marriage, is primarily understood to involve different-sex spouses. It is of course possible for the parties to lack proper consent in a same-sex marriage; indeed this was the case in the recent prosecution *US v. Al Hunaity*, where the victim was forced into a same-sex marriage with her employer.¹⁸ However, as will be discussed throughout this thesis, patriarchal and heteronormative structures are significantly at play in the phenomenon of non-consensual marriages, and arguably in marriage as an institution more widely. Furthermore, same-sex marriage was only fully legalized in the United States in 2015,¹⁹ making a bulk of research on this topic applicable to primarily heterosexual marriages. Accordingly, non-consensual marriages discussed in this thesis will largely be thought of as involving different-sex spouses. However, it is noted that the experiences of LGBTQI+ individuals in the context of marital consent is an area that warrants significant further research.

Children

For purposes of this examination, the term “child” is used as a legal term of art, referring to an individual under the age of legal majority of their home jurisdiction. At the federal level and in all US states, except for Mississippi,²⁰ the age of majority is 18.

Mental Disability

This thesis uniformly uses the terminology “persons with mental disabilities” in an effort to employ person-first language, with the understanding that the preferred terminology will vary from person-to-person.²¹ Additional clarification on terminology related to mental disability will be discussed in Chapter 2.2.

States and Court

¹⁷ See generally Forced Marriage Unit, ‘What Is Forced Marriage in the LGBT Community?’ (Home Office 2013).

¹⁸ *US v Hunaity* (2020) New Jersey District Court Criminal Record 1:18-cr-00723.

¹⁹ *Obergefell v. Hodges* (n 1).

²⁰ Mississippi has various levels of legal majority, but the general majority age is 21.

²¹ United Nations, ‘Disability-Inclusive Language Guidelines’ <<https://www.ungeneva.org/sites/default/files/2021-01/Disability-Inclusive-Language-Guidelines.pdf>>.

The United States governmental system is arranged under the concept of federalism, which is a power-balancing system between the federal and state governments. The federal government has three co-equal branches (Congress, the Supreme Court, and the President), and each state has its own legislative, judicial, and executive branches (generally known as the state Legislature, state Supreme Court, and the Governor). This thesis has assessed both US federal and state laws, but most cited legislation comes from the state legislatures, which are the primary deciders of family law within the US. For ease and clarity throughout this evaluation, the term has “State” refers to national entities (i.e. “UN member State”), while “state” is used to refer to individual states within the US (i.e. “the state of California”). Likewise, “the Supreme Court” and “Court” are used to denote the US Supreme Court, while “courts” is used when discussing decisions by any lower court.

Positionality

It is important to address the use of publicly available materials throughout this assessment. The decision to not engage in direct interviews, either with legislative officials or survivors of non-consensual marriage, was deliberate and necessary based on my close relationships in the field of forced marriage legislation.

Since obtaining my law license in 2016, I have been integrally involved in political and legal activities throughout the United States to address forced and child marriage. I served as the Director of Policy for the only non-profit specifically aimed at ending forced marriage in the United States, Unchained At Last (UAL). In my position at UAL, I assisted in the drafting of and lobbying for bills designed to eliminate loopholes allowing for marriages of children under the age of legal capacity. I worked directly with legislators from over 20 states, who represent a large portion of the politicians attempting to address this issue. I served as a legal expert on child and forced marriage in the first three states to end all forms of child marriage: Delaware, New Jersey, and Pennsylvania. I testified in dozens of legislative hearings and met directly with hundreds of legislators to answer their questions about pending child marriage legislation. My research and testimony have been cited across the US in legislative advocacy campaigns to end child and forced marriage.²² Through this work, I met and became close allies with many of the country’s

²² See eg. S Mueller, ‘Delaware Expected To Be The First State To Ban Child Marriage Outright’ *NPR* (3 May 2018) <<https://www.kpbs.org/news/2018/05/03/delaware-expected-to-be-the-first-state-to-ban>>; ‘First State Ban on Child Marriage Clears General Assembly’ *Delaware Public Media* (3 May 2018).

most prominent activists and survivors of forced and child marriage. I also served as Program Lead for the New Jersey Human Trafficking Legal Assistance Program, providing direct legal representation for victims of human trafficking, including survivors of forced marriage. In that role, I became even more embedded in the fight against non-consensual marriage, both through legal advocacy and policymaking. For example, I served as family law legal counsel to the victim of one of the only two forced marriage cases taken on by the US Attorney General's Office. I also worked closely with the Federal Bureau of Investigation and Department of State on several cases related to victims of forced marriage.

Due to my work in this field, it would be both unproductive and unethical to conduct interviews with the key players of forced marriage advocacy in the United States. I have close personal relationships with many of the main political activists and legislators working to end child marriage, which would prevent me from obtaining objective data. It would also be imprudent to interview the most vocal opposers of marriage reform, as I have frequently argued in opposition to their views in both the media and public legislative hearings.

Finally, and most importantly, it would be unethical to pursue survivor interviews. There are relatively few survivors in the US that have come "out of the woodwork" to discuss their non-consensual marriages openly. For many that have surfaced, I have served as a legal advocate or as an advising consultant in their immigration, family law, or other legal matters. Even with those survivors that I have not represented as an attorney, I have become close personal friends through our shared work in this space. I am also known by survivors I have not personally met due to my advocacy involvement. I cannot with solid academic standing obtain data from prior legal clients and survivors who may have a personal relationship to me or my work. For this reason, I have decided to draw on publicly available resources and documentation to ensure transparency of sources throughout this thesis.

1.2 Debating the Definition of “Forced Marriage”

This thesis takes a unique look at “marital consent”, broadly defined as the consent to enter into and remain in a marriage. Based on an extensive review, little scholarship has focused on this topic specifically, and in fact this thesis is novel in its exploration of the parameters of marital consent in the US. The majority of existing literature related to consent and marriage focuses on the concept of “forced marriage”.

The most basic inquiry on this topic is perhaps its most perplexing: how do we define forced marriage? There is no one universal definition of forced marriage and both governmental actors and scholars have struggled to agree on a cogent set of boundaries on when a marriage is “forced”.²³ The Council of Europe, for instance, issued a definition that was exceptionally broad:

[Forced marriage is] an umbrella term covering marriage as slavery, arranged marriage, traditional marriage, marriage for reasons of custom, expediency or perceived respectability, child marriage, early marriage, fictitious, bogus or sham marriage, marriage of convenience, unconsummated marriage, putative marriage, marriage to acquire nationality and undesirable marriage.²⁴

This lack of definitional specificity is especially prevalent in the literature on forced marriage in the US, which is already limited and narrow in scope. However, from the existing literature, a few common definitional threads begin to emerge.

Forced Marriage as the Absence of “Full and Free Consent”

The most prominent language in definitions of forced marriage is the need for the “full and free consent” of the parties. The UN Declaration of Human Rights, for example, states that, “Marriage shall be entered into only with the free and full consent of the intending spouse”,²⁵ which implies

²³ See eg. F Bohkari, ‘Stolen Futures: Trafficking for Forced Child Marriage in the UK’ (ECPAT UK 2009) (“There is no internationally agreed definition of forced marriage”); H Love and others, ‘The Complexities and Challenges of Researching Forced Marriage in the US’ (2017) 10 (“A major challenge to identifying, researching, and intervening in forced marriages is the absence of a uniform definition.”); see also H Love and others, ‘Navigating an Unclear Terrain: Challenges in Recognizing, Naming, and Accessing Services for “Forced Marriage”’ (2019) 25 *Violence Against Women* 1138.

²⁴ E Rude-Antoine, ‘Forced Marriages in Council of Europe Member States: A Comparative Study of Legislation and Political Initiatives’ (Council of Europe 2005) at 7.

²⁵ United Nations Declaration of Human Rights (Art. 16(2)).

that without such consent, a marriage is impermissible. The 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages specifies that, “No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and other witnesses.”²⁶ The OHCHR has further defined forced marriage specifically as “a marriage in which one and/or both parties have not personally expressed their full and free consent to the union.”²⁷ The European Union Agency for Fundamental Rights similarly defined forced marriage as “a marriage concluded without the consent of one or both partners and therefore against the will of at least one of them” and as a “serious violation of human rights.”²⁸

The “full and free consent” language has been used as a foundational definition by forced marriage researchers such as Ebeturk and Cowart,²⁹ Morin,³⁰ Villacampa and Torres,³¹ Psaila, Leigh, Verbari, Fiorentini, Dalla Pozza, and Gomez³², and US organizations focusing on forced marriage, including Unchained at Last,³³ the Tahirih Justice Center³⁴ and the Sauti Yetu Center for African Women.³⁵ Consent language is also used by researchers looking at marriages of persons with learning disabilities, such as Clawson and Kitson, who stipulate that “Some people with learning disabilities do not have the capacity to consent to marriage...if a person with a learning disability does not have the capacity to consent, the marriage must be deemed as

²⁶ Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962.

²⁷ ‘Child and Forced Marriage, Including in Humanitarian Settings’ (Office of the United Nations High Commissioner for Human Rights) (last accessed 7 Jan 2025).

²⁸ ‘Addressing Forced Marriage in the EU: Legal Provisions and Promising Practices’ (European Union Agency for Fundamental Rights 2014).

²⁹ IA Ebeturk and O Cowart, ‘Criminalization of Forced Marriage in Europe: A Qualitative Comparative Analysis’ (2017) 58 *International Journal of Comparative Sociology* 169 (forced marriage is “a marriage in which free and full consent of at least one of the parties is absent”).

³⁰ KB Morin, ‘Understanding the Practice of Early and Forced Marriage in North America and Its Effects on Women’ [2017] *Samuel Centre for Social Connectedness* 35 (forced marriage refers to a “marital union, which occurs without the free and informed consent of one or more of the parties”).

³¹ C Villacampa and N Torres, ‘Forced Marriage: What Do Professionals Know?’ (2021) 67 *International Journal of Law, Crime and Justice* 1 (forced marriage is “marriage without the consent of both partners.”)

³² E Psaila and others, ‘Forced Marriage from a Gender Perspective’ (European Parliament Committee on Women’s Rights and Gender Equality 2016).

³³ Unchained At Last, ‘Forced/Arranged/Child Marriage’ <<https://www.unchainedatlast.org/about-arranged-forced-marriage/>> accessed 21 February 2024 (“In a forced marriage, one or both parties do not give full, free consent.”)

³⁴ Tahirih Justice Center, ‘Forced Marriage in Immigrant Communities in the United States’ (2011) (“A forced marriage is one that takes place without the full and free consent of one or both parties.”)

³⁵ R Bangura, T Tran and K Schermerhorn, ‘A Closer Look at Forced and Early Marriage in African Immigrant Communities in New York City’ (Sauti Yetu Center for African Women 2012) (forced marriage is a “marriage that occurs without the expressed consent of either one or both of the parties.”)

forced.”³⁶ Consent to marriage amongst persons with mental disabilities will be discussed at length in Chapter 2.2.

Despite the continued use of the language of “full and free consent” throughout forced marriage discourse, what is sorely lacking is an examination of what exactly constitutes valid consent. The Council of Europe has defined consent to marry as consisting of both the psychological intent to marry and the formal declaration of that intent.³⁷ Yet, there is still little discourse on how these internal and external indicators of consent should be judged. Anitha and Gill highlight the problematic nature of the current use of consent language, arguing that viewing marriage on a binary of “consented to” or “forced” fails to encompass a spectrum of factors that influence an individual’s decision to agree to marriage.³⁸ They contend that defining forced marriage in this way erroneously asks us to imagine a fictional independent actor who gives consent free from contextual influences, such as race, class or gender.³⁹ This critical view of the “full and free consent” language is shared by Gangoli, Chantler, Hester, and Singleton, who find that “there are often tensions between definitions and the experiences of victims/survivors of forced marriage” as a result of a binary view of consent to marry.⁴⁰

Some broader theorists challenge the very notion of consent when applied to marriage, particularly in the context of capitalism and patriarchy. For instance, Marin argues that the State’s prioritization of marriage pushes individuals into these relationships to ensure necessary support (what she defines as “care oppression”), when instead the State should focus on the regulation of dependent caretaking relationships, such as parents to children.⁴¹ Other scholars argue under the theory of “compulsory heterosexuality” that all heterosexual marriages are without true bilateral consent, as women are conditioned to consent to marriage, even when it is not in their best

³⁶ See R Clawson and R Fyson, ‘Forced Marriage of People with Learning Disabilities: A Human Rights Issue’ (2017) 32 Disability and Society 610.

³⁷ See Rude-Antoine (n 24).

³⁸ See S Anitha and A Gill, ‘Reconceptualising Consent and Coercion within an Intersectional Understanding of Forced Marriage’, *Forced Marriage: Introducing a Social Justice and Human Rights Perspective* (Zed Books 2011).

³⁹ See S Anitha and A Gill, ‘Coercion, Consent and the Forced Marriage Debate in the UK’ (2009) 17 Feminist Legal Studies 165.

⁴⁰ See G Gangoli and others, ‘Understanding Forced Marriage: Definitions and Realities’, *Forced Marriage: Introducing a Social Justice and Human Rights Perspective* (Zed Books 2011) <Forced Marriage: Introducing a Social Justice and Human Rights Perspective> at 25.

⁴¹ See M Marin, ‘Care, Oppression, and Marriage’ (2014) 29 Hypatia 337.

interest. To authors such as Hester⁴² and Rich⁴³ women become willing victims to patriarchal institutions such as marriage as a result of ongoing social conditioning, which ultimately leads to their subjugation. To these authors, consent given under a system of compulsory heterosexuality cannot be considered freely given nor morally valid.

Of those identified, the most expansive definition of forced marriage focused on consent in the US was developed by Dank, Love, Esthappen, and Zweig in conjunction with the Tahirih Justice Center: “a marriage when people did not feel like they had a real choice around 1) when they wanted to get married; 2) who they married; or 3) when they got married, or they felt they could not express what they really wanted without negative consequences.”⁴⁴ This definition significantly expands upon the “free and full consent” language and will likely encapsulate a much wider variety of scenarios where consent to marriage is contested. One of the primary aims of this thesis is to continue exploring the definitional issues surrounding forced marriage and examine what factors constitute valid consent under both a theoretical framework and under current US laws.

Forced Marriage as a Result of Duress/Coercion

Some organizations and scholars include in the definition of forced marriage both the language of “full and free consent” and the additional elements of “duress” or “coercion.” For instance, the UN High Commissioner for Human Rights defined forced marriage as “any marriage which occurs without the full and free consent of one or both of the parties and/or where one or both of the parties is/are unable to end or leave the marriage, including as a result of duress or intense social or family pressure.”⁴⁵ Former United Nations Secretary General Kofi Annan described forced marriage in terms of extreme duress, calling it marriage through the use of “threatening behaviour, abduction, imprisonment, physical violence, rape and in some cases, murder.”⁴⁶

⁴² See M Hester, *Lewd Women and Wicked Witches: A Study of the Dynamics of Male Domination* (Routledge 1992).

⁴³ See A Rich, ‘Compulsory Heterosexuality and Lesbian Existence’ (1980) 15 *Journal of Women’s History* 11.

⁴⁴ M Dank and others, ‘Exploratory Research into the Intersection of Forced Marriage, Intimate Partner Violence, and Sexual Violence’ (National Institute of Justice 2018).

⁴⁵ ‘Preventing and Eliminating Child, Early and Forced Marriage’ (Office of the United Nations High Commissioner for Human Rights 2014) A/HRC/26/22.

⁴⁶ ‘In-Depth Study on All Forms of Violence against Women: Report of the Secretary General’ (United Nations General Assembly 2006) A/61/122/Add.1.

The US Department of State likewise defines forced marriage as where “at least one party does not consent or is unable to give informed consent to the marriage, and some element of duress is generally present.”⁴⁷ This definition is in line with the description of forced marriage laid out in the UK’s Forced Marriage Civil Protection Act of 2007. This Act states that “a person (“A”) is forced into a marriage if another person (“B”) forces A to enter into a marriage (whether with B or another person) without A’s free and full consent” and that “force” includes coerce by threats or other psychological means...”⁴⁸ This language is echoed by the UK Working Group on Forced Marriage⁴⁹ and UK Crown Prosecution Service.⁵⁰ Researchers, including Alanen,⁵¹ Brock and Buckthal,⁵² Enright,⁵³ Roy,⁵⁴ Swegman,⁵⁵ and Martin⁵⁶ also include an element of duress or coercion in their definition of forced marriage.

Here again, there is a significant opening in the research, which this thesis will seek to address. There is little guidance on how we should define “force”, “duress”, or “coercion” in a legal context, and even less so in the context of marital consent. This thesis will therefore explore these terms in detail and determine how they apply to marriage across US legal systems in Chapter 3.1.

⁴⁷Consular Affairs, ‘Foreign Affairs Manual Volume’ (United States Department of State 2005) at 7.

⁴⁸ UK Forced Marriage (Civil Protection) Act 2007.

⁴⁹ See Home Office, ‘A Choice by Right: The Report of the Working Group on Forced Marriage’ (June 2000).

⁵⁰ Crown Prosecution Service, *Honour-Based Violence and Forced Marriage* (The Code for Crown Prosecutors 2019).

⁵¹ Alanen, Julia, ‘Shattering the Silence Surrounding Forced and Early Marriage in the United States’ (2012) 31 (“The term ‘forced marriage’ describes circumstances where one or both spouses enter into or remain in a marriage against their will, under physical force or psychological duress, or without free and valid consent.”)

⁵² M Brock and E Buckthal, ‘Historical Overview of U.S. Policy and Legislative Responses to Honor-Based Violence, Forced Marriage, and Female Genital Mutilation/Cutting’ [2018] NIJ Report (“A marriage conducted without the consent of one or both parties where duress is a factor.”)

⁵³ Máiréad Enright, ‘Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arranged Marriage’ (2009) 72 *Modern Law Review* 331 (forced marriage is a “a marriage in which at least one of the spouses, whether by reason of physical, emotional or psychological pressure, did not give consent to be married.”)

⁵⁴ D Roy, ‘An Introduction to Forced Marriage in the South Asian Community of the United States’ 57 (forced marriage is “when two individuals, irrespective of gender or age, are coerced into marriage without consent from one or both parties”.)

⁵⁵ C Swegman, ‘The Intersectionality of Forced Marriage with Other Forms of Abuse in the United States’ (Tahirih Justice Center 2016) (“A forced marriage is one that takes place without the full and free consent of one or both parties and typically involves force, fraud, or coercion.”)

⁵⁶ LV Martin, ‘Restraining Forced Marriage’ [2017] SSRN Electronic Journal
<<https://www.ssrn.com/abstract=2962589>> accessed 27 December 2021.

Child Marriage as Forced Marriage

Child marriage, broadly defined as the marriage of an individual under the age of legal majority (generally 18), is deeply tied to forced marriage throughout the literature. Some actors deliberately conflate child marriage with forced marriage, finding that children cannot consent to enter a marriage, and it is therefore *per se* forced when one of the parties is under the age of legal majority. For example, the Convention on the Elimination of All Forms of Discrimination against Women stipulates that, “The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”⁵⁷

In line with CEDAW, the OHCHR, finds that “child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent.”⁵⁸ The European Parliament has also adopted this view stating, “As forced marriage takes place in the absence of free and full consent of one or both spouses, the notion of forced marriage necessarily encompasses child marriage...”⁵⁹ The defining of child marriage as a form of forced marriage is also supported by some scholars, who view a child’s lack of legal decision-making capacity as an automatic violation of the requirements for “full and free consent.”⁶⁰ For instance, Dank, Love, Esthappan, and Zweig clarify that “Embedded within our definition [of forced marriage] was an understanding that individuals under the age of 18 cannot give consent to marry...”⁶¹

Despite these assertions, child marriage is still a permissible practice in most of the US (which has notably not ratified CEDAW). As a result, an estimated 300,000 children were married in the US from 2000-2018.⁶² If we accept the definition of child marriage or forced marriage, then all of these marriages are *per se* forced marriages. This framing obviously creates massive challenges for state legal systems and has created significant controversy in the forced marriage discourse, which will be discussed at length in Chapter 2.1 of this thesis.

⁵⁷ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979.

⁵⁸ ‘Child and Forced Marriage, Including in Humanitarian Settings’ (n 27).

⁵⁹ Psaila and others (n 32).

⁶⁰ See eg. LM Kopelman, ‘The Forced Marriage of Minors: A Neglected Form of Child Abuse’ (2016) 44 Journal of Law, Medicine & Ethics 173 (arguing that child marriage is a form of child abuse that triggers the duty to report to child welfare agencies.)

⁶¹ M Dank and others, ‘Exploratory Research into the Intersection of Forced Marriage, Intimate Partner Violence, and Sexual Violence’ (Report to National Institute of Justice 2018).

⁶² Unchained At Last, ‘United States’ Child Marriage Problem: Study Findings’ (April 2021).

Forced Marriage as a Unique Crime

The other topics discussed in much of the literature are the responses to forced marriage. The most discussed of these responses is the debate on the criminalization of forced marriage as its own crime. Currently the debate is centered on whether the US should follow the example of the UK, where the Anti-social Behaviour, Crime and Policing Act 2014 has already made forced marriage a stand-alone criminal offense in England, Scotland, and Wales.⁶³ Some sources herald the law as a victory for survivors and as having a strong normative effect.⁶⁴ Other authors argue strongly against blanket criminalization, citing concerns about driving the practice “underground” and assert that victims will not want to report forced marriage cases if they believe their family members might be criminally prosecuted.⁶⁵ Begum’s study on the efficacy of criminalization suggests that, in general, victims of forced marriage and professionals serving these individuals often reject criminalization, as it can be harmful and potentially retraumatizing to survivors.⁶⁶ Some critics also assert that the criminal law on forced marriage in the UK, where political focus has been almost entirely on marriages within South Asian and Muslim communities (discussed below), serves to further ostracize minorities and that survivors do not want to further stigmatize their community by bringing forward criminal allegations.⁶⁷

As much of the existing literature focuses on the criminal responses to forced marriage, there has been little attention paid to potential civil remedies. This dissertation seeks to address this significant oversight by highlighting the importance of family law in forced marriage cases. Some publications exist that discuss family law solely in the context of raising the minimum age for marriage.⁶⁸ However, in articles focusing primarily on forced marriage, there is little

⁶³ UK Anti-social Behaviour, Crime and Policing Act 2014.

⁶⁴ See eg. A Gill and D Gould, ‘The Role of Family Coercion, Culture, Expert Witnesses and Best Practice in Securing Forced Marriage Convictions’ (2020) 4 *Journal of Gender-Based Violence* 89.

⁶⁵ See eg. IA Ebeturk and O Cowart, ‘Criminalization of Forced Marriage in Europe: A Qualitative Comparative Analysis’ (2017) 58 *International Journal of Comparative Sociology* 169; Tahirih Justice Center, ‘National Consultation- Should Forced Marriage Be a Crime in the United States’ (1 June 2016).

⁶⁶ See P Begum, ‘Should Forced Marriage Be Criminalised?’ (2016); see also N Torres and C Villacampa, ‘Intervention with Victims of Forced Marriage’ [2021] *Women & Criminal Justice* 1 (arguing that a victim-centered approach to forced marriage intervention requires a move away from focus on criminalization).

⁶⁷ See G Gangoli and M McCarry, ‘Criminalising Forced Marriage’ (2008) 74 *Centre for Crime and Justice Studies* 44; Ebeturk and Cowart, ‘Criminalization of Forced Marriage in Europe: A Qualitative Comparative Analysis’ (n 29).

⁶⁸ See *Unchained At Last* (n 62); Karma Nirvana, ‘Child Marriage in England and Wales’ (2020).

discussion over the State's role in the perpetuation of forced marriage. This thesis seeks to provide the first in-depth analysis of the family laws of the US to address this gap in research.

Forced Marriage as Human Trafficking

Some actors define forced marriage as a form of human trafficking or “modern-day slavery”. The UN Temporary Slavery Commission in 1924 included in its list of practices analogous to slavery “acquisition of girls by purchase disguised as payment of dowry, it being understood that this does not refer to normal marriage customs”.⁶⁹ The Supplementary Convention of 1956 went on to prohibit any instance where “a woman, without the right to refuse, is promised or given in marriage” for value to any other person.⁷⁰ Commenters such as Sobik,⁷¹ Warner,⁷² Bohkari⁷³, Gill and Anitha,⁷⁴ Kakar,⁷⁵ Warria,⁷⁶ Igareda Gonzalez and Barcons Campmajo⁷⁷ contend that forced marriage can constitute a form of human trafficking and argue for the application of anti-trafficking legislation to these cases. Şişli likewise argues that child marriage should be viewed as a form of child labor, and therefore a modern slavery issue.⁷⁸

However, not all commentators support the categorization of forced marriage as a form of human trafficking or slavery. For instance, Haenen argues that forced marriage is not, in itself, a form of slavery, as denial of the right to marry freely is not equated to the right against ownership as laid out by international conventions.⁷⁹ Allain also distinguishes forced marriage from a generalized categorization of human trafficking, arguing that CEDAW lays out only a positive right to choose

⁶⁹ Temporary Slavery Commission 1924.

⁷⁰ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

⁷¹ See J Sobik, ‘Behind Closed Doors- Child and Early Marriage as Slavery’ [2015] Anti-Slavery International.

⁷² See E Warner, ‘Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls’ (2011) 12 Journal of Gender, Social Policy & the Law 233.

⁷³ See Bohkari (n 23).

⁷⁴ See A Gill, S Anitha and A Warria, ‘Forced Child Marriages as a Form of Child Trafficking’ (2017) 79 Children and Youth Services Review 274.

⁷⁵ See S Kakar, ‘Child/Forced/Servile Marriages ⇌ Human Trafficking’ in J Winterdyk and J Jones (eds), *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan 2019).

⁷⁶ See Gill, Anitha and Warria (n 74).

⁷⁷ See N Igareda Gonzalez and M Barcons Campmajo, ‘Approaching Forced Marriages as a New Form of Trafficking in Human Beings in Europe’ (Ghent University, Autonomous University of Barcelona, and Centro Scienza Onlus 2015).

⁷⁸ See *ibid*.

⁷⁹ See I Haenen, ‘The Parameters of Enslavement and the Act of Forced Marriage’ (2013) 13 International Criminal Law Review 895.

one's marital partner, rather than a definitive human right against forced marriage.⁸⁰ He also argues that forced marriage in conflict scenarios, which may more clearly fit a trafficking model, need to be distinguished from marriages that are forced due to familial pressure and cultural norms.⁸¹ Villacampa and Torres have shed light on the tension on defining forced marriage as a form of slavery, suggesting that criminal justice actors are more likely than social service providers to frame forced marriage as a human trafficking issue, rather than as domestic violence or a human rights abuse.⁸²

Forced Marriage as a “Cultural” Issue

Perhaps the most consistent, and to some troubling, trend in the existing literature is an almost universal focus on forced marriage as a “cultural issue” tied to Middle Eastern, North African and South Asian (MENASA) countries and their diaspora communities.

Research from the UK

Of the global literature on forced marriage, this thesis has most extensively explored scholarship from the UK. The context of non-consensual marriages in the UK shares many similarities with the US. Both the UK and US follow common law systems, and both are high-GDP, Caucasian-majority nations with large ethnic minority and immigrant populations. More so than in the US (and indeed other countries fitting this categorization, including Australia, Ireland, and Canada) the UK sources have produced significant quantities of literature on forced marriage. UK governmental agencies, for example, have produced several reports on forced marriage that have served as foundational research for legislators both in the UK and abroad.⁸³

However, while a volume of scholarship on forced marriage may have emerged from the UK, a bulk of this research is confined to a focus on minority cultural, religious, and immigrant

⁸⁰ See J Allain, ‘When Forced Marriage Is Slavery’, *The Law and Slavery* (Brill Nijhoff 2015).

⁸¹ *ibid.* For additional reading on consent to marry and forced marriage in conflict scenarios, see H Baumeister, ‘Forced Marriage Real Simple’ (2020) 1 *Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence* 25.

⁸² See C Villacampa and N Torres, ‘Forced Marriage: What Do Professionals Know?’ (2021) 67 *International Journal of Law, Crime and Justice* 1.

⁸³ See *eg.* Home Office, ‘A Choice by Right: The Report of the Working Group on Forced Marriage’ (June 2000); ‘Forced Marriage – a Wrong Not a Right’ (Foreign and Commonwealth Office 2005); Forced Marriage Unit, ‘The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage’ (UK Home Office 2008); Forced Marriage Unit, ‘Multi-Agency Practice Guidelines: Handling Cases of Forced Marriage’ (Home Office 2014); Forced Marriage Unit, R Clawson and R Vallance, ‘Forced Marriage and Learning Disabilities: Multi-Agency Practice Guidelines’ (Home Office 2009).

communities. Authors such as Anitha,⁸⁴ Begum,⁸⁵ Gill,⁸⁶ Harvery,⁸⁷ Gould,⁸⁸ Gangoli,⁸⁹ Ben Maiz,⁹⁰ Romani,⁹¹ Quek,⁹² Samad and Eade⁹³ have provided commentary on forced marriage in the UK specifically on diaspora communities, specifically South Asians and/or Muslims.⁹⁴ The defining of forced marriage as a form of culturally-rooted “honor violence” is also prevalent throughout the literature, including in publications by the UK Crown Prosecution Service.⁹⁵ Critics argue that this focus on “honor violence” by governmental actors is largely in part to xenophobic and stereotypical opinions of Muslim and South Asian communities, which are viewed by the British White majority as “uncivilized”.⁹⁶ In contrast, other reports, such as research conducted by Yurdakul and Korteweg, indicate that service providers intentionally do not label certain practices as “honor”-based out of a concern for appearing racist or culturally insensitive.⁹⁷

⁸⁴ S Anitha and A Gill, ‘Coercion, Consent and the Forced Marriage Debate in the UK’ (2009) 17 *Feminist Legal Studies* 165 (looking specifically at structural inequalities facing South Asian women and their effects on forced marriage.)

⁸⁵ Begum (n 66).

⁸⁶ A Gill and T Hamed, ‘Muslim Women and Forced Marriage in the United Kingdom’ (2016) 36 *Journal of Muslim Minority Affairs* 540.

⁸⁷ See A Gill and H Harvey, ‘Examining the Impact of Gender on Young People’s Views of Forced Marriage in Britain’ (2016) 12 *Feminist Criminology* (interviewing primarily members of Muslim communities to determine attitudes on forced marriage amongst young people.)

⁸⁸ See Gill and Gould (n 64).

⁸⁹ See G Gangoli, K Chantler and A Razak, ‘Child Marriage or Forced Marriage: South Asian Communities in North East England’ (2009) 23 *Children and Society* 418.

⁹⁰ See S Ben Maiz, ‘Forced Marriage in Muslim Asian Communities : Whose Right to Choose? The Plight of Women from South Asia to the U.K.’ (2003).

⁹¹ See LP Romani, ‘Does Multiculturalism Pose a Problem for the Implementation of Individual Rights? : The Case of Forced Marriage in the Context of the United Kingdom’.

⁹² See K Quek, ‘A Civil Rather Than Criminal Offence? Forced Marriage, Harm and the Politics of Multiculturalism in the UK’ (2012) 15 *The British Journal of Politics and International Relations* 626.

⁹³ See Y Samad and J Eade, ‘Community Perceptions of Forced Marriage’ (Foreign and Commonwealth Office 2002)(focusing on Pakistani and Bangladeshi communities in the UK.)

⁹⁴ One study from the UK has explored forced marriage outside of “cultural” communities focused on in Scotland and included non-immigrant, Caucasian populations into this assessment; see K Chantler and others, ‘Understanding Forced Marriage in Scotland’ (Government of Scotland Social Research 2017); see also K Chantler and M McCarry, ‘Forced Marriage, Coercive Control, and Conducive Contexts: The Experiences of Women in Scotland’ (89) 26 *Violence Against Women* 2019.

⁹⁵ Crown Prosecution Service, *Honour-Based Violence and Forced Marriage* (The Code for Crown Prosecutors 2019); see also L Bates, ‘Honor-Based Abuse in England and Wales: Who Does What to Whom?’ (2021) 10 *Violence Against Women* 1774 (identifying forced marriage as a form of culturally-based honor violence); A Ashraf, ‘Forced Marriage and Health’ (2015) 12 *Diversity and Equality in Healthcare* 89 (“In a forced marriage arrangement, it is considered that the ‘honour’ of the family is protected and that, culturally and religiously, this is what needs to be done.”)

⁹⁶ See A Brah and A Gill, ‘Interrogating Cultural Narratives about “Honor” Based Violence’ (2014) 21 *European Journal of Women’s Studies* 72; see also A Wilson, ‘The Forced Marriage Debate and the British State’ 49 *Race and Class* 25 (arguing that legal focus on forced marriage as honor violence is indicative of structural racism, against Muslims and “collusion with South Asian patriarchy.”)

⁹⁷ See G Yurdakul and A Korteweg, ‘Gender Equality and Immigrant Integration: Honor Killing and Forced Marriage Debates in the Netherlands, Germany, and Britain’ (2013) 41 *Women’s Studies International Forum* 204.

There has also been much debate in the UK on tactics that have been implemented as proposed methods to prevent forced marriage, such as raising the minimum age to sponsor an immigrant spouse. While this measure has been lauded by some as a positive step in preventing the exploitation of young people from forced marriages for immigration purposes, commenters such as Hester, Chantler, Gangoli, Ahmed, Burman, Sharma, Singleton, Westmarland, and McCarry contend that such a measure would have limited effectiveness in preventing forced marriage and is instead aimed at creating additional and unduly restrictive barriers for immigration into the UK.⁹⁸ Phillips and Dustin likewise caution against relying on immigration regulation as a method to curb forced marriage.⁹⁹

Research from the US

Turning to the US, there is an almost universal focus on forced marriage as a cultural practice in immigrant and religious communities, particularly originating from the MENASA region or other Muslim-majority nations. This focus is deeply entrenched, but when critically examined, unjustified by the existing data. For example, in one of the most extensive governmental reports related to forced marriage within the US, the National Institute of Justice's *Historic Overview of U.S Policy and Legislative Responses to Honor-Based Violence, Forced Marriage, and Female Genital Mutilation/Cutting*, all cited examples of forced marriage in the US involve members of what are called "practicing communities", namely immigrant groups.¹⁰⁰ The express aim of the report is to "help improve criminal justice professionals' ability to understand and accurately identify incidents of gender-based violence in the United States that are rooted in the cultural practices of particular immigrant communities."¹⁰¹ However, the report provides no concrete explanation for why or how "particular immigrant communities" have been singled out for this evaluation.

⁹⁸ See M Hester and others, 'Forced Marriage: The Risk Factors and the Effect of Raising the Minimum Age for a Sponsor, and of Leave to Enter the UK as a Spouse or Fiancé(e)' (School for Policy Studies, University of Bristol and School of Nursing, Midwifery and Social Work, University of Manchester 2008); see also Geetanjali Gangoli and Khatidja Chantler, 'Protecting Victims of Forced Marriage: Is Age a Protective Factor?' (2009) 17 *Feminist Legal Studies* 267 (finding that age is not a primary factor in determining vulnerability to forced marriage and arguing against the raising of the immigration sponsorship age.)

⁹⁹ See A Phillips and M Dustin, 'UK Initiatives on Forced Marriage: Regulation, Dialogue and Exit' (2004) 52 *Political Studies* 531.

¹⁰⁰ Brock and Buckthal (n 52).

¹⁰¹ *ibid.*

The report claims: “Forced marital unions are predominantly practiced by communities in Africa, the Middle East, and South Asia, including among Buddhists and Hindus”,¹⁰² but provides no further explanation or citations for this assertion. To support this conclusion, the report provides a map on the “Global Prevalence of Forced Marriage”, but the map is in fact mislabeled. Instead of showing cases of identified forced marriage globally, as the title suggests, the map instead shows the percentage of a country’s population married as children and no data from the US is provided.¹⁰³ This is highly problematic. Firstly, it completely discounts forced marriages that do not involve children, a massive data oversight. Secondly, the report does not clearly define child marriage as *per se* forced marriage. Instead, it states “When child marriages (unions where one or both parties is not yet 18) are *arranged*, they are essentially forced because minors are unable to give consent.”¹⁰⁴ Yet, this map applies the label of “forced marriage” to child marriage wholesale to other countries, while excluding the US from this evaluation. As discussed above, the majority of US states still allow for child marriage.

The report also includes a table on the “Top Destinations for Immigration from Select Countries with High Prevalence of Forced Marriage”, claiming that 79% of the “total immigrant population” originating from these “high prevalence” countries immigrate to the US.¹⁰⁵ No citation is provided on how forced marriage is defined or calculated for purposes of determining what constitutes “high-prevalence” of forced marriage within a country and no methodological reasoning is given for the selection of this list of 19 nations. Of these “high prevalence” countries, 16 were located in Africa and South Asia¹⁰⁶ and nine were Muslim-majority nations.¹⁰⁷

A particularly troubling issue emerges when we hone-in on the data provided for one country in particular: Mexico. Mexico is included in the list of countries with a “high prevalence” of forced marriage, which steeply drives the percentage of immigration from these “high prevalence” nations upward, as Mexicans are the largest immigrant group into the US.¹⁰⁸ However, the report

¹⁰² *ibid* at 18.

¹⁰³ *ibid* at 19.

¹⁰⁴ *ibid* at 17 (emphasis added).

¹⁰⁵ *ibid* at 41.

¹⁰⁶ Bangladesh, Burkina Faso, Central African Republic, Chad, Democratic Republic of Congo, Ethiopia, Guinea, India, Malawi, Mali, Mozambique, Niger, Nigeria, Pakistan, South Sudan, and Tanzania.

¹⁰⁷ Bangladesh, Burkina Faso, Chad, Guinea, Indonesia, Mali, Niger, Nigeria, Pakistan.

¹⁰⁸ Data collected from the Pew Research Institute, identifies Mexican immigrants as 23% of the total immigrant population into the US. M Moslimani and J Passel, ‘What the Data Says about Immigrants in the U.S.’ (Pew Research Center 2024).

provides no information on the prevalence of forced marriage in Mexico. As stated above, the only metric that the report seems to use to identify the prevalence of forced marriage in a nation is the percentage of the population that marries as children. According to a global leader in child marriage research, Girls Not Brides, the percentage of the total population married before the age of 18 in Mexico is 21%.¹⁰⁹ This is a lower percentage than GNB's estimates for almost all other Central American countries, yet none of these countries are included in the list of "high prevalence" nations. The report's own map of "Global Prevalence of Forced Marriage", discussed above, does not even place Mexico in the top 30 countries where forced marriage is most "prevalent."¹¹⁰ By inexplicably including Mexico in the list of countries with a "high prevalence" of forced marriage, the report substantially and erroneously inflates its statistical estimates on the prevalence of forced marriage in US immigrant communities.

By so harshly challenging the findings in the NIJ report, it is not contested that forced marriages may occur in high numbers in some of the identified nations and their diaspora communities. Rather, it is argued that no solid methodological framework has been laid out to support the NIJ's findings on forced marriage within US-based immigrant communities. This report, an official publication of the Department of Justice, purported to be a "high-level analysis, comprising a concise global historical perspective", relies on sparse and inaccurate data, unclear definitions, and cherry-picked evidence to paint a picture of forced marriage as a problem originating from "foreign" influences in the US. This is particularly concerning because the emphasis on foreign actors as the perpetrators of forced marriage is clearly reflected in the US legislative response to forced marriage. For instance, in the International Protecting Girls by Preventing Child Marriage Act, the US government vowed to address child marriage overseas but made no mention of children in the US.¹¹¹ In fact, no federal legislation has been passed that directly addresses non-consensual marriages that occur within the United States.

Organizational and scholarly research on consent and marriage within the US has likewise been limited in almost all instances to "cultural practices" within the MENASA diaspora and/or Muslim religious communities. Organizations such as the Sauti Yetu Center¹¹² and Tahirih Justice

¹⁰⁹ Girls Not Brides, 'Mexico' <<https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/mexico/>> accessed 10 January 2025.

¹¹⁰ Brock and Buckthal (n 52) at 19.

¹¹¹ International Protecting Girls by Preventing Child Marriage Act 2012.

¹¹² Bangura, Tran and Schermerhorn (n 35).

Center¹¹³ have created literature on forced marriage, but only as it relates to immigrant communities in the US. Authors such as Roy,¹¹⁴ Burris,¹¹⁵ and Martin¹¹⁶ have focused their inquiries on forced marriage in immigrant populations within the US, particularly South Asians. Landua provides a more extensive analysis of the forced marriage debate in the US, including the debate on criminalization, but draws the majority of her statistics from research by the Tahirih Justice Center, which as stated above focuses only on immigrant women in the US.¹¹⁷ Alanen broadens the discussion somewhat by mentioning “shotgun weddings”, but again limits his inquiry largely to immigrant communities.¹¹⁸ Marcus, Begum, Alsabahi, and Curtis frame their research as a response to the intense focus on diaspora communities from the MENASA region and the subsequent “stigmatising [of] migrant cultural practices.”¹¹⁹ However, despite this recognition, the researchers in fact limit their assessment of forced marriage in the US to individuals from “MENASA background” in an effort to “compare to European studies”, thereby continuing the focus on these cultural communities.

Research for this thesis has identified only a few recent studies from the US that look at marital consent beyond specific cultural communities. One such study by Wahi, Zaleski, Lampe, Bevan, and Koski conducted a relatively modest assessment of 21, self-identifying individuals who married as children throughout the US. Interestingly, most of these individuals were Caucasian and were not married due to religious or “cultural” practices.¹²⁰ Another study that expanded past specific immigrant communities was conducted by McFarlane, Nava, Gilroy, and Maddoux.¹²¹ This report surveyed results from 277 mothers who had reported intimate partner violence to a

¹¹³ ‘Forced Marriage in Immigrant Communities in the United States’ (n 34).

¹¹⁴ See Roy (n 54).

¹¹⁵ See C Burris, ‘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’ (2014) 23 *Tulane Journal of International and Comparative Law* 151.

¹¹⁶ See Martin (n 56).

¹¹⁷ See E Landau, ‘Custom or Crime? Part II of IV: Legal Remedies for Forced Marriage Victims and Survivors’ (2016) 29 *American Journal of Family Law* 227.

¹¹⁸ See J Alanen, ‘Custom or Crime?: Part I of IV: Catalysts and Consequences of Forced Marriage’ (2016) 29 *American Journal of Family Law* 227; see also J Alanen, ‘Shattering the Silence Surrounding Forced and Early Marriage in the United States’ (2012) 32 *Children’s Legal Rights Journal* 2 (where all identified “catalysts” to early and forced marriage involve a cultural, honor-based, or religious motivations).

¹¹⁹ See A Marcus and others, ‘Between Choice and Obligation: An Exploratory Assessment of Forced Marriage Problems and Policies among Migrants in the United States’ [2017] Cambridge University Press.

¹²⁰ See Aditi Wahi and others, ‘The Lived Experience of Child Marriage in the United States’ (2019) 34 *Social Work in Public Health* 201.

¹²¹ Judith McFarlane and others, ‘Child Brides, Forced Marriage, and Partner Violence in America: Tip of an Iceberg Revealed’ (2016) 127 *Obstetrics & Gynecology* 706.

shelter or social service provider. The subject pool was not limited to the MENASA diaspora or Muslim women, and the majority of surveyed participants were US citizens and/or women of Hispanic heritage. These participants were asked if they had ever been subjected to a forced marriage or forced marriage attempt. 17% of participants reported a forced marriage attempt, and 45% of these attempts occurred while the participant was under 18 years old.¹²²

One of the most recent and unique studies to empirically explore forced marriage in the US outside of a culturally-specific context yielded highly surprising results.¹²³ The research team originally constructed a survey to locate and interview forced marriage survivors in the South Asian community in the DC metropolitan area.¹²⁴ However, upon receiving limited results, the researchers expanded the survey to internet users anywhere in the US.¹²⁵ The number of subjects was still limited, but the most expansive in terms of actual survivor engagement of any US study to date. In total, 752 respondents reported being subjected to a forced marriage.¹²⁶

In a hugely surprising result, men were more likely to report a forced marriage than female respondents.¹²⁷ The research team, having concluded from their literature review that forced marriage is a gender-based issue affecting mostly women, hypothesized how their methodology could have been flawed to produce this result¹²⁸. They conclude that their screening questions to identify forced marriage were too broad: “Have you ever been in or faced a marriage or engagement that (1) you did not choose whether, when or whom you married; and (2) you could not say ‘no’ without bad things happening?”¹²⁹ 11.4% of all respondents answered “yes” to one or both of these questions, which the research team conjectures is too high to be accurate.¹³⁰ However, is it not possible that this study for the first time encapsulates cases that fall along a broader spectrum of marital consent? By keeping the description of “bad things” open ended, perhaps this study has finally allowed for subjects who do not typically identify as forced

¹²² *ibid.*

¹²³ S Esthappan and others, ‘Understanding Forced Marriage in the United States: Developing Measures, Examining Its Nature, and Assessing Gender Disparities’ (2021) 36 *Journal of Interpersonal Violence* 5730.

¹²⁴ *ibid*; *see also* Hanna Love and others, ‘The Complexities and Challenges of Researching Forced Marriage in the US’ 10.

¹²⁵ Esthappan and others (n 123) at 5736.

¹²⁶ *ibid* at 5740.

¹²⁷ *ibid* 5742.

¹²⁸ *ibid* at 5749.

¹²⁹ *ibid* at 5737 and 5749.

¹³⁰ *ibid* at 5749.

marriage survivors to come forward. Rather than seeing these findings as opening a new frontier in forced marriage discourse, the researchers undermine these findings to comport to the narrow, existing understanding of forced marriage.

Criticism of defining forced marriage as a “cultural issue”

Based on this literature review, why has the discourse on forced marriage been so narrowly focused on minority cultural communities? The glib answer would be that forced marriage only significantly occurs within these communities, so no outside inquiry is required. However, it is argued that the existing research does not support such a broad assumption, and this resistance is shared by other scholarly critics. Gill and Anitha, for example, argue strongly that racist and xenophobic influences in media and popular culture, rather than strong empirical evidence, are at the root of the image of the platonic “forced marriage” victim as a subservient girl from the MESANA region or diaspora.¹³¹ Other critics such as Dustin and Phillip,¹³² Razack,¹³³ Wilson,¹³⁴ Bredal,¹³⁵ Mitra-Kahn,¹³⁶ Chantler and Hester¹³⁷ argue that discourse on forced marriage in the UK, along with other forms of familial violence, has become an arena for critics of multiculturalism to stereotype immigrant communities as antiquated in their views towards marriage and gender equality. Critics such as Ebeturk and Cowart highlight a similar phenomenon of cultural stereotyping in the forced marriage debate throughout the EU.¹³⁸ Samad notes that a myopic understanding of forced marriage not only perpetuates stereotyping, but also leads to the exclusion of other classes of victim from the forced marriage debate, specifically

¹³¹ See S Anitha and A Gill, ‘The Social Construction of Forced Marriage and Its “Victim” in Media Coverage and Crime Policy Discourse’, *Forced Marriage: Introducing a Social Justice and Human Rights Perspective* (Zed Books 2011); see also A Gill and S Anitha, ‘The Illusion of Protection? An Analysis of Forced Marriage Legislation and Policy in the UK’ (2009) 21 *Journal of Social Welfare and Family Law* 257; see also S Anitha and A Gill, ‘A Moral Panic? The Problematisation of Forced Marriage in British Newspapers’ (2015) 21 *Violence Against Women* 1123.

¹³² See M Dustin and A Phillips, ‘Whose Agenda Is It? Abuses of Women and Abuses of “Culture” in Britain’ (2008) 8 *Ethnicities* 405.

¹³³ See S Razack, ‘Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages’ (2004) 12 *Feminist Legal Studies* 129.

¹³⁴ See Wilson (n 96).

¹³⁵ See A Bredal, ‘Arranged Marriages as a Multicultural Battle Field’ in M Mette Andersson, Y Lithman and O Sernhede (eds), *Youth, Otherness, and the Plural City: Modes of Belonging and Social Life, Daidalos* (Gothenburg 2005).

¹³⁶ See A Gill and T Mitra-Kahn, ‘Modernising the “Other”: Assessing the Ideological Underpinnings of the Policy Discourse on Forced Marriage in the UK’ [2010] *Journal of Policy and Politics*.

¹³⁷ See K Chantler, G Gangoli and M Hester, ‘Forced Marriage in the UK: Religious, Cultural, Economic or State Violence?’ (2009) 29 *Critical Social Policy* 587.

¹³⁸ See Ebeturk and Cowart, ‘Criminalization of Forced Marriage in Europe: A Qualitative Comparative Analysis’ (n 29).

men.¹³⁹ Chantler likewise asserts that the categorization of forced marriage as a “cultural” issue overlooks a major component of the offense, namely its relationship to domestic and gender-based violence.¹⁴⁰

This thesis will expand on these critiques of the monolithic view of forced marriage as a “cultural” practice. As laid out above, much of the existing the literature provides only a brief and unexplored definition of forced marriage and its related terminology. From this tenuous understanding of what constitutes a lack of marital consent, it is arguably impossible to fully account for the variety of non-consensual marriages that might occur throughout US society. However well-intentioned, researchers and policymakers have not challenged their basic assumptions of forced marriage, and instead commit wholesale to a view of the practice as a culture-specific issue. The next chapter will grapple with this limited view of forced marriage in the US and propose three hypotheses for why legislators, researchers, and the general public have become so set in a limited understanding of forced marriage.

¹³⁹ See Y Samad, ‘Forced Marriage among Men: An Unrecognized Problem’ (2010) 30 Critical Social Policy 189.

¹⁴⁰ See K Chantler, ‘Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse’ (2012) 13 Trauma, Violence, & Abuse 176.

1.3 Limits on the Understanding of Non-Consensual Marriage in the US¹⁴¹

Ask the average American about forced marriage, and their mind will likely turn towards religious zealotry and insular immigrant communities, both seen as far outside the US norm. As discussed in the previous chapter, the result of this myopic focus is an “othering” of non-consensual marriage, where such marriages are a phenomenon arising from foreigners and fanatics, not mainstream society. However, we need not look far to find examples of non-consensual marriage that are far more familiar to the “typical” American family. Just think of the “shotgun wedding”, and we realize that the idea of the American forced marriage is perhaps more complex than the modern conceptualizations would suggest.

Non-profits working with survivors of non-consensual marriage in the US report cases across all racial and religious lines.¹⁴² Why then have such marriages been relegated to a “cultural” issue, outside of the “normal” American society? This chapter outlines three major reasons that have potentially contributed to the narrow view of non-consensual marriage within the US. The first is the historical importance of consent as a theoretical pillar of US matrimonial law, as well as American ideology more broadly, with simultaneous disregard to portions of the population restricted from giving true consent. Second is the continued use of allegations of “forced marriage” as a tool to exclude certain racial and religious communities. The third, and perhaps most prevalent, is the entrenched attitude of law makers and the general public on the relationship between sex, marriage, and maternity and a societal disdain for unwed motherhood.

To accept that current conceptualization of non-consensual marriage is fundamentally limited does not mean a dismissal of the issue; quite the contrary. It means we must in fact dig deeper, broadening this understanding to explore the wide variety of coercive pressures to enter marriage, as well as the barriers to exiting an unwanted marriage. In exploring an expanded view of non-consensual marriages in the US, it is in no way asserted that such marriages do not occur within discrete racial and religious groups and that these marriages may cause serious harm to survivors. Rather, this research seeks to discover how and why these cases are singled out as the preeminent examples of “forced marriage” in the US.

¹⁴¹ Upcoming publication in *Gender and Justice* (anticipated 2027).

¹⁴² See *generally* *Unchained At Last* (n 16).

Consent as Americanism

For hundreds of years before even the founding of the US, the Catholic Church had emphasized the consent of parties as the key aspect of a marriage, even more important than the consummation of the union. This concept, which came to be known as the “Consent Doctrine”, dictated that the essential requirement of a marriage was that the spouses issued their consent to enter the union and held themselves out to be a married couple.¹⁴³ In a 1792 statement on marriages under the Doctrine, statesman and legal philosopher James Wilson proclaimed, “the agreement of the parties, the essence of every rational contract, is indispensably required.”¹⁴⁴

Beyond being well-established in both canonical and British common law, the Consent Doctrine fit neatly into the ideals of Revolutionary thinkers in conceptualizing the new American democracy. Consent as an expression of free will became a tenant of the argument for US independence from Great Britain.¹⁴⁵ Consent to be governed, and crucially, consent by *whom* to be governed, was indeed the key issue for those seeking emancipation from monarchical oppression in favor of a democratic government. Revolutionaries could draw a direct parallel to the relationship between a husband as the head of a marriage ruling over his wife to a political leader ruling over his subjects: just as a wife must consent to be ruled by her husband by entering the marriage union, it followed that a people must consent to be ruled by their chosen government.¹⁴⁶ To early American legal scholars, where consent is not given, no valid marriage can exist, and perhaps by the same reasoning, where consent is not given, no valid government can exist.

The Consent Doctrine became the guiding tenant of early American matrimonial law. It was an accepted component of the English common law that had been adopted relatively wholesale by the American colonies, and uniquely suited the needs of the young nation.¹⁴⁷ Many early-US communities lacked formal legal structures, such as court clerks, and there was little state

¹⁴³ See generally S Coontz, *Marriage, a History: How Love Conquered Marriage* (Penguin books 2006); NF Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press 2002); PL Reynolds, ‘Betrothal and Consent’, *How marriage became one of the sacraments: The sacramental theology of marriage from its medieval origins to the Council of Trent* (Cambridge University Press 2019).

¹⁴⁴ J Wilson, ‘Lectures on Law’ (1792) at Chapter 1.

¹⁴⁵ See eg. Cott (n 143) (discussion of connection between early American democracy and ideals of marital consent).

¹⁴⁶ *ibid.*

¹⁴⁷ See eg. NL Syrett, *American Child Bride: A History of Minors and Marriage in the United States* (The University of North Carolina Press 2018); Cott (n 143) at Chapter 2.

regulation over family affairs.¹⁴⁸ The regular registration of marriages, births, and deaths as a matter of state priority was still decades away. Moreover, formalized marital unions were most prevalent amongst the minority societal elite to secure their inheritance and properties; the majority lower ranking in society were far less likely to seek the structure of a state-sponsored marriage contract, and instead entered more informal unions that would be solidified simply by nature of the parties agreeing to be bound as man and wife.¹⁴⁹ The Consent Doctrine proved a useful device in the newly independent colonies, allowing for informal marriages (what came to be known as “common law” marriages) to be validated by both local community and state governments.¹⁵⁰ Judges throughout the Revolutionary and Antebellum eras tended to uphold marriages as valid if the parties consented to be married and the wider community accepted the marriage as legitimate.¹⁵¹

Through the late 1800s, state governments sought to more broadly standardize marital law through statute, and common law marriages fell out of favor. By the mid-20th century, most states had eliminated common law marriages, effectively ending the rule of the Consent Doctrine as the primary marital law of the land.¹⁵² However, the core principle of the Doctrine remained strong across state legal systems: the key to a valid marriage was the consent of the parties. The Supreme Court reaffirmed this tenant with its decision in *Meister v. Moore*, finding that marriage was a “civil contract based on consent” and that even a non-ceremonial marriage was a valid enforceable marriage, unless a state’s statute forbade it.¹⁵³

The Consent Doctrine’s influence is still evident throughout US family law systems, specifically in state dissolution laws.¹⁵⁴ Provisions for annulment across state laws provide grounds for the invalidation of a marriage where proper consent is not given, with the vast majority of states providing annulment grounds by statute for lack of legitimate consent.¹⁵⁵ The Consent Doctrine’s influence can also be seen in a general rejection of “covenant marriage” across the states. Not

¹⁴⁸ See generally Cott (n 143) at Chapter 2; Coontz (n 143) at 66 (discussing the historical precedent in Roman and Anglo-Saxon traditions of informal marriage practices amongst the common classes.)

¹⁴⁹ See generally Coontz (n 143) at 66.

¹⁵⁰ See AR Dubler, ‘Governing through Contract: Common Law Marriage in the Nineteenth Century’ (1998) 107 The Yale Law Journal 1885; Coontz (n 143) at Chapter 2

¹⁵¹ See generally Cott (n 143) at Chapter 2.

¹⁵² See generally Dubler (n 150).

¹⁵³ *Meister v Moore* (1877) 96 US 76 (US Supreme Court).

¹⁵⁴ Dissolution laws for lack of proper consent will be discussed at-length in Parts II and III.

¹⁵⁵ See Statute Compendium B, F, and G.

originally part of the US family law system, concern over rising divorce rates in the mid-1990s led to a renewed legislative interest in covenant marriages, where the spouses enter into an additional agreement to be bound more strictly within the marriage.¹⁵⁶ Covenant marriages generally prohibit divorce except for on specified fault grounds and set additional barriers to exiting the marriage, such as counseling and extensive waiting times. Louisiana became the first state to allow for covenant marriage with the Covenant Marriage Act of 1997, and Arkansas and Arizona quickly followed suit.¹⁵⁷ Legislators in these states, influenced heavily by Christian religious doctrine, touted the legislation as a way to protect families from divorce.¹⁵⁸

However, despite this initial fervor, no other states have since implemented covenant marriage and it has been almost entirely rejected by the general populace.¹⁵⁹ In Louisiana, less than 1% of couples married between 2000-2010 chose covenant marriage.¹⁶⁰ Rates are even lower in the other two states, with only 0.25% of couples in Arizona choosing a covenant marriage and a mere 9 couples total in such a marriage in Arkansas as of 2013.¹⁶¹ Even with the great emphasis put on marriage by lawmakers, covenant marriage stands in opposition to the Consent Doctrine's prioritization of individual choice in deciding to enter, and, correspondingly, leave a marriage. Even for spouses who intend their marriages to be lifelong (presumably most couples), there has been a fundamental rejection of covenant marriage's additional limitations to exiting the marriage at one's own will. This prioritization of one's own choice to remain married contributes greatly to the failure of covenant marriage to be implemented more widely across the US. Covenant marriage and other barriers to exiting a marriage will be discussed in greater detail in Chapter 3.3.

In principle, the Consent Doctrine's legacy in the US family law system ensures that the parties in a marriage wish explicitly to enter into the contract and remain bound by its terms. If consent truly reigns supreme as the basis for the American marriage, there is no possibility of a forced marriage. From this idealized view, consent to marry is a fundamental aspect of American legal

¹⁵⁶ See eg. M Lawton, 'The Constitutionality of Covenant Marriage Laws' (1998) 66 Fordham Law Review 2471.

¹⁵⁷ *ibid.*

¹⁵⁸ See generally A Krugger, 'What Is Covenant Marriage?' *New York Times* (3 November 2023).

¹⁵⁹ P Feuerherd, 'Why Covenant Marriage Failed to Take Off' (*JSTOR Daily*, 11 February 2019)

<<https://daily.jstor.org/why-covenant-marriage-failed-to-take-off/>>.

¹⁶⁰ S Stritof, 'Covenant Marriage Statistics'

<https://web.archive.org/web/20141006131450/http://marriage.about.com/cs/covenantmarriage/a/covenant_3.htm> accessed 21 January 2025.

¹⁶¹ *ibid.*

culture, woven into the fabric of the very founding of the nation. However, the reality of the Consent Doctrine's application has often been far from this egalitarian ideal. Just as the Declaration of Independence's promise that "All Men are Created Equal" did in fact not apply to many Americans who were seen as less than, so too has the Consent Doctrine's assurance of consensual marriage failed to encompass the inability of many social groups to give true marital consent. Societal disenfranchisement of many kinds, including race, gender, disability, or socioeconomic status can all affect one's ability to withstand the pressure to marry or to pursue a means to exit an unwanted marriage, as shall be discussed in great detail in later chapters.

Perhaps the most striking example of the disconnect between the early American ideals of marital consent and the reality of that consent is one of the most overlooked: marriages of enslaved persons. Prior to emancipation, enslaved persons were prevented from marrying under state law as they lacked legal personhood under the civil system and were considered the chattel of enslavers.¹⁶² The Supreme Court cemented this disenfranchisement in *Hall v. United States*, where the Court found that enslaved persons held no political or civil rights while in servitude, nor did they possess any right to contract.¹⁶³ However, this did not prevent informal marriage from being a central tenant of the families of enslaved persons. It is well-documented that enslaved persons entered into what were considered by their own communities to be meaningful and abiding marital relationships, albeit without legal license (which as discussed above was not uncommon amongst many American marriages at the time.)¹⁶⁴ Indeed, after emancipation, many formerly enslaved couples with long-standing cohabitation were automatically issued marriage licenses, primarily to legitimize children born into these unions.¹⁶⁵ Yet the consent of enslaved persons to be joined in a marital relationship meant nothing within a legislative system that denied them legal personhood throughout the US's long history of slavery.¹⁶⁶ As stated by the North Carolina Supreme Court in 1858, "The relation between slaves is essentially different from that of man and wife joined in lawful wedlock...with slaves it may be dissolved at the pleasure of either party, or by the sale of one or both, depending upon the caprice or necessity of the owners."¹⁶⁷

¹⁶² See eg. DC Goring, 'The History of Slave Marriage in the United States' (2006) 39 J. Marshall Law Review 299.

¹⁶³ *Hall v United States* (1875) 92 US 27 (US Supreme Court).

¹⁶⁴ See eg. MA Burnham, *An Impossible Marriage: Slave Law and Family Law* (1987) at 190.

¹⁶⁵ Goring (n 162) at 309.

¹⁶⁶ See generally Burnham (n 164); Goring (n 162).

¹⁶⁷ See K Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum Society* (Vintage Books 1989).

Moreover, the inability of enslaved persons to legally marry did not protect them from being forced into marital relationships by enslavers for the purposes of childbearing.¹⁶⁸ The only party that could “solemnize” the marriage of two enslaved persons was an enslaver, generally a plantation owner.¹⁶⁹ Such approval to a marriage of enslaved persons gave no legal status to the couple, merely a relationship where it became acceptable to bear children, which served primarily as a wealth-generating mechanism for plantation owners to increase the number of enslaved workers within their control.¹⁷⁰ In some instances, marriages were forced by an enslaver in an effort to have a “quieting effect” on enslaved persons who resisted their conditions.¹⁷¹ This practice was even encouraged by the judiciary, with one Louisiana court stating, “Slaves constituting a family would probably labor more cheerfully and harmoniously together, and, by consequence, would be more useful than those not so related.”¹⁷²

Such marriages are almost completely absent from modern discussions of non-consensual marriage but were an all-too-common practice in early America to control and regulate the behavior and offspring of enslaved persons. Some Antebellum-era abolitionists did point to marriage as an example of the fundamental flaws of slavery, arguing that enslavers violated the sanctity of marital and parental relationships, which were seen as holy institutions, when they asserted ownership over enslaved families.¹⁷³ Indeed, it would seem a glaringly obvious contradiction to build a matrimonial legal system on the principle of consent, and then disregard this consent as to millions of individuals. However, as enslaved persons were widely overlooked in the public’s view of personhood, this hypocrisy did not shake the general view of the American marriage as one based on egalitarian consent.

The inextricability of freedom in both American marriage and governance has firm roots in the imaginations of the general public and legislators, regardless of the reality of the family law landscape. From this view, if a marriage is not consensual, it is simply not American; it must come from “outsiders.”

¹⁶⁸ Burnham (n 16) at 196.

¹⁶⁹ See eg. Burnham (n 164).

¹⁷⁰ See Goring (n 162) at 310

¹⁷¹ Burnham (n 164) at 200.

¹⁷² *Bertrand v Arcueil* (1849) 4 La Ann 430 (Louisiana).

¹⁷³ Burnham (n 164) at 310-11.

Marriage Practices as Justification for Minority Exclusion

The belief in the fundamental “Americanism” of marital consent advanced a line of reasoning that has extended into the modern discourse on forced marriage. That is, if marital consent is American, the absence of that consent is *per se* un-American; those who would force another into a marriage must be outside the norm and their ideology cannot be allowed to infiltrate the US matrimonial system. This rationale has played a powerful role in the exclusion of minority communities throughout history and continues to be a rallying cry for the targeting of certain racial and religious groups.

Allegations of forced marriage, or more broadly non-consensual marriages, have been levied against a variety of minority groups throughout history to achieve vilification and exclusion. While a wide variety of immigrant communities have faced these allegations, the East Asian community faced particular vitriol throughout the 19th and 20th centuries. Anti-Asian sentiment pervaded the mid to late 1800s, with widespread calls for restrictions on Chinese immigration. Laborers concerned about losing work to “coolies”, who they perceived as accepting lower wages and working conditions, called for Chinese exclusion based not simply on arguments about employment, but more broadly on the inferiority of the Asian race to White Americans.¹⁷⁴ For instance, a petition to the US Congress signed by seventeen thousand California “working men”, expressed fear that Chinese immigrants would “arrest the advancement of our civilization.”¹⁷⁵

A primary concern of those seeking to limit Asian immigration was the “un-American” nature of the Chinese population’s view of consent. The first House and Senate committee inquiry into Chinese immigration reported, “The American race is progressive and in favor of a responsible representative government. The Mongolian race seems to have no desire for progress and to have no conception of representative and free institutions.”¹⁷⁶ The belief that Asian cultures could not honor the American ideals of free consent underpinned several restrictions on Chinese immigration throughout the 19th century, most notably the Page Act of 1875. The Page Act highlighted legislators’ fear that Chinese immigrants did not share “American values” in relation to women, marriage, and sexual relations. The Act restricted immigration of “prostitutes” and required that any immigrant from an Asian nation was determined not to be under contract for

¹⁷⁴ See eg. Syrett (n 147) at Chapter 6; Cott (n 143) at Chapter 2.

¹⁷⁵ Speech by Horace F. Page [Feb. 10, 1875]; see also Cott (n 143) at Chapter 6.

¹⁷⁶ “Report of the Joint Special Committee to Investigate Chinese Immigration,” CR 44/2, part 3 [Feb. 28, 1877] at 2004–05.

“lewd or immoral purposes.”¹⁷⁷ While, in reality, Chinese women represented only a small portion of sex workers in the US at this time, legislators took aim at the perceived immorality of the Chinese community, particularly their perceived disregard for the importance of monogamy and consent to sexual relations.¹⁷⁸ Like the “coolies”, policy-makers imagined that Chinese sex workers accepted a position of servitude and deference to authority, without the ability to consent to their treatment or to be true women under the Victorian standards of femininity (i.e. a wife and mother).¹⁷⁹ From this perspective, all Chinese women, not just known sex workers, could not be trusted, as they lacked the American understanding of consent and the importance of marriage to sexual relations. Indeed, the Page Act virtually eliminated the immigration of Chinese women to the United States for the next decade.¹⁸⁰

By the 20th century, Anti-Asian sentiment had turned towards the Japanese, and again the image of the helpless Asian woman and bride was levied to emphasize the “un-Americanness” of the community. Fueled by governmentally sanctioned discrimination during WWII, Japanese Americans faced growing racism and exclusion in the early to mid-1900s. Those seeking to vilify the community pointed to the practice of proxy marriage, or “picture wives”, as an example of the Japanese disregard for the American ideals of marital consent. Proxy marriage was based on an accepted Japanese custom for a relative or friend to facilitate a potential marriage between two families.¹⁸¹ This practice was adapted in the era of wider Japanese immigration, when many young men were sent to find work in America, by instituting a trading of pictures. First, a picture of the groom would be sent to the bride and her family, and if she was agreeable, her picture would be sent to him in the hopes of securing an engagement. If both families were satisfied with the match, a marriage would be performed in Japan, with a proxy standing in for the groom, and the bride would then travel to the US to join her new husband. Once together in the US, the couple would make the union official with an American marriage ceremony.¹⁸²

¹⁷⁷ Page Act 1875, Sect. 141, 18 Stat. 477.

¹⁷⁸ See eg. Cott (n 143) at Chapter 6 (discussing the Page Act and its connection to the immigration of Chinese women into the US).

¹⁷⁹ *ibid.*

¹⁸⁰ See Cott (n 143).

¹⁸¹ See eg. C Lee, *Prostitutes and Picture Brides: Chinese and Japanese Immigration, Settlement, and American Nation-Building, 1870-1920* (Center for Comparative Immigration Studies, University of California, San Diego 2003).

¹⁸² *ibid.*

While “picture brides” represented a relatively small minority of immigrants, the practice came under fire from anti-Japanese protestors in the early 1900s.¹⁸³ Vocal amongst these was the San Francisco Labor Council, which contended that picture brides would produce a generation of children that would be “a new race question which in time, if unchecked, will become as great and vexatious, well-nigh impossible of solution, as the negro question.”¹⁸⁴ California Senator James D. Phelan echoed the rejection of picture brides stating, “The marriage that is contracted on the other side—the parties are separated by an ocean and merely exchange photographs—is no marriage at all.”¹⁸⁵ Again, anti-Asian immigration activists pointed to the un-Americanness of marital practices as a justification for racial exclusion.

The hyper-focus on “barbaric” marriages within the Asian community is reflected in an 1889 report by the New York Society for the Prevention of Cruelty to Children, which discussed a 14-year-old American girl who married a Japanese man. The reports states, “[H]ad [the marriage] been at home, it is not probable much would have been said about the matter though she was under the age of consent. The place he took her to was, in fact, a pest-hole of Chinese, Japanese, and vile characters in Water Street.”¹⁸⁶ It is evident that the greatest concern was not on the girl’s ability to consent to marriage, but rather that the marriage was associated with the perceived inhumanity of the East Asian community.

Despite the widespread claims of abuses such as those in the Society’s report, data from the era shows that children from immigrant communities were in fact less likely to marry than their US citizen counterparts.¹⁸⁷ Most children married in the US throughout the late 19th and early 20th centuries were from the rural South, not immigrant-populated cities.¹⁸⁸ Some prominent social service workers of the time noted this discrepancy, and sought to correct the bias against immigrant communities. In their 1925 report on child marriage in America, Richmond and Hall reported, “More than two-thirds of a million people living in this country have been child brides or have been married to child brides...Only a small minority of such brides are foreign; most of

¹⁸³ Cott (n 143) at Chapter 6.

¹⁸⁴ San Francisco Labor Council, Petition to President Woodrow Wilson, entry 9, box 107, file 52424/13A; *see also* *ibid.*

¹⁸⁵ James D. Phelan, Speech on Dec. 14, 1916; *see also* Cott (n 143) at Chapter 6.

¹⁸⁶ New York Society for the Prevention of Cruelty to Children, New York City Municipal Archives, Box 233, Folder XXVIII.448; *see also* Syrett (n 147) at Chapter 7.

¹⁸⁷ *See* Syrett (n 147) at Chapter 7.

¹⁸⁸ *ibid.*

them are native white of native parentage.”¹⁸⁹ As summarized by Superintendent of the Brooklyn Society for the Prevention of Cruelty to Children, Author Towne, in 1922: “Let us not imagine [child] marriages occur only among our immigrant population; they are probably about as prevalent among our native stock.”¹⁹⁰

Yet even in the face of marriages that defied the American ideals of consent, the public view that a non-consensual marriage was a foreign issue could not be shaken. This bias was particularly evident in the infamous case of Charlie and Eunice Johns in 1937. Charlie, age 23, and Eunice, age 9, were married in their home state of Tennessee.¹⁹¹ Eunice’s shockingly young age created a media frenzy, and the case became national news and even spawned a motion picture, ‘*Child Bride*.’¹⁹² The filmmakers took significant liberties with the story and the film drew ire for its depiction of Appalachian culture, as well as its express sexualization of children (including a nude bathing scene featuring a 12-year old actress.)¹⁹³ Such portrayal served to create a sensationalized view of child marriage within isolated “hillbilly” communities. Moreover, despite both parties being white, Christian, and US citizens, newspapers ran stories likening the case to imagined horrors of Africa and “the Orient”, with the Chicago Tribune decrying the marriage as an “Evil of India Repeated Here.”¹⁹⁴ These and other reports painted the marriage as one not belonging to normal American society, but rather to less-sophisticated cultures, particularly in the global South. Instead of shifting the public’s view on marital consent towards white Americans, the Johns case ultimately served to more deeply entrench the idea of a non-consensual marriage as foreign and barbaric.

The widespread “othering” of non-consensual marriage has not been limited to racial discrimination. Religious communities, especially those practicing polygamy, have faced widespread condemnation for their marital practices and their failure to assimilate to the American marriage ideal. The most prominent example of this phenomenon is the Mormon community throughout the 19th century. By 1860, the population of Utah, predominately Mormons, had grown to roughly 40,000 and the territory grew ever closer to statehood.¹⁹⁵ The

¹⁸⁹ ME Richmond and FS Hall, *Child Marriages* (Russell Sage Foundation 1925).

¹⁹⁰ Syrett (n 147) at 193.

¹⁹¹ See eg. ‘Education: Exempt Bride’ [1937] TIME.

¹⁹² *Child Bride* (Directed by H Reviver, Astor Pictures 1938).

¹⁹³ See NL Syrett, ‘Imagining Rural Sexuality in the Depression Era: Child Brides, Exploitation Film, and the Winstead-Johns Marriage’ (American Studies Association Annual Meeting, Baltimore, MD, 25 November 2014).

¹⁹⁴ ‘America Has Its Child Brides’ *The Chicago Tribune* (1937).

¹⁹⁵ See eg. Cott (n 143) at Chapter 5.

community's polygamist practices posed a serious challenge to the idealized views on American marriage, a challenge that proved unacceptable to many of the country's elite politicians. As with arguments for racial exclusion based on forced marriage practices, anti-polygamist politicians argued that Mormon women lacked the ability and desire to exercise true consent when entering a plural marriage.

Politicians painted a picture of Mormon women as "bound slaves", forced to enter a plural marriage and thrown at the mercy of their domineering husbands.¹⁹⁶ In response, Congress sought to pass the Cullom Bill in 1870, which would systematically withdraw citizenship privileges from men who practiced polygamy, including restricting their right to vote and hold public office.¹⁹⁷ In opposition to their stigmatization as oppressed and silent servants, mass group meetings of Mormon women throughout the late 1800s voiced their support of plural marriage and argued against the condemnation of their husbands under federal law.¹⁹⁸ Of course, it must be noted that these women could be, and likely were, influenced by patriarchal ideals of the Church and pressure by male family members to speak out in defense of polygamist practices. However, demonstrations such as those led by spokeswomen Harriet Cook Young show that, at least in principle, many Mormon women believed strongly that they were exercising true consent in entering plural marriages. In one of her speeches against the Cullom Bill, Young decried Congress's effort to "give the lie to the popular clamour that the women of Utah are oppressed and held in bondage."¹⁹⁹

The voices of Mormon women had little effect however on the perception of polygamy as a foreign evil, just as it had been envisioned in discussions of forced marriage within racial minority communities. In its 1856 platform, the Republican party decried the "twin relics of barbarism—polygamy and slavery."²⁰⁰ Anti-polygamists of the 19th century demonized the practice as an immoral practice of "less-civilized" cultures, unfit for American society.²⁰¹ James Morrill, sponsor of the Morrill Act that made bigamy a federal crime, declared polygamy

¹⁹⁶ See SB Gordon, "'The Twin Relic of Barbarism': A Legal History of Anti-Polygamy in Nineteenth-Century America" [1995] Ph.D. diss., Princeton University 174 at 174-76.

¹⁹⁷ See eg. 'Editorial: The Abolition of Polygamy (Mr. Cullom's Anti-Polygamy Bill)' *The Chicago Tribune* (1870).

¹⁹⁸ See eg. Cott (n 143) at Chapter 5.

¹⁹⁹ Statements of Harriet Cook Young, quoted from minutes of "The Great Indignation Meeting" (January 13, 1870).

²⁰⁰ KH Porter, *National Party Platforms* (1924) at 48; see also SB Gordon, "'Our National Hearthstone': Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America" (1996) 8 *Yale Journal of Law & the Humanities* 295 at 305.

²⁰¹ See generally Gordon (n 200).

“Mohammedan barbarism.”²⁰² When the “Mormon question” reached the Supreme Court in the seminal case *Reynolds v. US*, the Court solidified the view of polygamy as “savage” and entirely un-American. In his majority opinion upholding Congress’s right to prohibit bigamy, Chief Justice Waite called polygamy a preserve of “Asiatic and of African people...odious to northern and western Europeans.”²⁰³ *Reynolds* paved the way for further federal restrictions on polygamy and punishments for those who continued the practice, and strict legislation against polygamy continues to this day.²⁰⁴

Mormons have not been the only community affected by outrage over polygamy, with immigrants again being restricted access to the US based on their cultural marriage practices. In 1891, immigration restrictions were put into place to prohibit polygamists from entering the US, and in 1907 the restriction was broadened to any “persons who admit their belief in the practice of polygamy.”²⁰⁵ This excluded not just individuals practicing polygamy, but potentially any migrant who practiced a religion that accepted plural marriage. As a result, between 1908 and 1910, an estimated 131 individuals were denied entry to the US on the basis of polygamist practices.²⁰⁶ The vehement campaign against Mormons and other religious communities practicing plural marriage is indicative of the steadfast belief amongst both politicians and the general public of the inherent Americanism of monogamous marriage. In the words of Justice Joseph Bradley in 1889, polygamy was “a blot on our civilization . . . in a measure, a return to barbarism...contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.”²⁰⁷

The stigmatization of marriage practices as a means for exclusion is not merely a remnant of America’s prejudicial past. It continues to be a powerful tool for social ostracization, as most prominently evidenced by the public demonization of Muslim Americans in the post-9/11 era. News coverage of forced marriages in the 21st century has focused almost exclusively on

²⁰² SE Smith, ‘Barbarians within the Gates: Congressional Debates on Mormon Polygamy, 1850-1879’ (2009) 51 *Journal of Church and State* 587.

²⁰³ *Reynolds v US* (1878) 98 US 145 (US Supreme Court).

²⁰⁴ See generally C Faucon, ‘Marriage Outlaws: Regulating Polygamy in America’ (2014) 22 *Duke Journal of Gender, Law & Policy* 1.

²⁰⁵ An Act to Regulate the Immigration of Aliens into the United States (Immigration Act) 1907, 34 Stat. 898; see also Cott (n 143) at Chapter 6.

²⁰⁶ Comm.-Gen. of Immigration to [the Secretary of State], April 14, 1910, and other correspondence, Jan.-April 1910, at 1913–14, U.S. Bureau of Immigration files, National Archives RG 85, entry 9, box 151, file 52737/499; see also *ibid*.

²⁰⁷ *Mormon Church [or Late Corp of LDS] v US* (1889) 136 US 1 (US Supreme Court).

members of the Muslim community. Stories such as the highly publicized cases of Yaser Abdel Sair²⁰⁸ and Faleh Hassan Almaleki,²⁰⁹ both of whom murdered their teen daughters when the girls resisted arranged marriages, dominate the news cycle. Certainly, these cases are tragic, and it is important to recognize and mourn the victims of any familial violence. However, the hyper-focus on forced marriage and honor violence in Muslim families has been used to paint an image of the wider community as oppressive, violent, and unconcerned with marital consent, particularly for women and girls. This image of forced marriage amongst Muslim families has infiltrated the psyches of the American public and legislators.

The true breadth of non-consensual marriage in the US is all but unknown, largely because the limited research has focused almost exclusively on racial and religious communities, as discussed in Chapter 1.2. What little data and anecdotal evidence exists in fact points to a different reality. that child marriages are more likely to occur in rural communities, and largely involve Christian, US-born citizens.²¹⁰ Yet, the eyes of the public and legislators remains fixed on minority groups. We must therefore look closely at perhaps the most deeply entrenched cultural ideals that have contributed to the myopic view of American forced marriages: traditional puritanical values on sexual relations and the widespread fear of “unwed motherhood.”

Non-Consensual Marriage as a Solution to “Unwed Motherhood”

The term “shotgun wedding” is often used in jest but should in fact conjure an image of the grim reality of the many couples pressured to marry in the wake of an unplanned pregnancy. Marital consent is not prioritized, and is often completely ignored, when there is an issue of premarital sex or pregnancy. When a “girl’s ruin” is at issue, courts throughout history have shown little concern for the actual consent of the parties to marry. While many such cases involve underage children or victims of rape (statutory or otherwise), forcing the parties to marry has been seen as a far lesser sin than to leave a “ruined woman” or to allow a child to be born out of wedlock. As this section will expose, these decisions are often based less in actual concern for the parties involved than on the upholding of “traditional” social norms and the limitation of welfare assistance to single mothers. But from the outside perspective, the American public has largely accepted that it is simply the best option for a girl or woman to marry when she becomes

²⁰⁸ See R Riess, ‘Man Convicted in 2008 Murders of His Daughters Sentenced to Life in Prison without Parole’ [2022] CNN.

²⁰⁹ See M Baldacci, ‘Iraqi Immigrant Gets 34 Years for Killing “too Westernized” Daughter’ *CNN* (16 April 2011).

²¹⁰ See eg. Syrett (n 147) at Chapter 7.

pregnant, and therefore the union could never truly be defined by that dreaded term “forced marriage.”

The fear of unwed motherhood has deep roots in both conservative social and fiscal policy. While female chastity has been highly prioritized since the Puritanical founding of the US, the issue came particularly into the spotlight during the “purity campaigns” of the mid-to-late 1800s.²¹¹ The Victorian era promoted the image of a decent woman as one who was almost entirely asexual, engaging in sexual conduct only with her husband to produce legitimate offspring.²¹² “Good women” lacked any true desire for sexual intimacy, so those who engaged in intercourse outside of marriage must be either the victims of male sexual aggression or a “fallen woman”, such as a sex worker. Purity campaigners sought to save the souls of female victims of men who might “lead them astray.”²¹³ They were particularly concerned with the chastity of young girls and pushed for legislation that prohibited adult sexual conduct with children under a certain age, what came to be known as statutory rape laws.

In principle, statutory rape laws were designed to protect children who lacked the full intellectual and emotional capacity to consent to sex with adults who might prey upon their vulnerability. By the early 1900s, every state had adopted some form of statutory rape restriction, and these restrictions are still in place in various iterations throughout the US.²¹⁴ However, from the outset it was clear that these laws were designed less to protect children than to safeguard girls’ chastity for marriage. Most early statutory rape laws did not apply when a girl was not a virgin, regardless of her age at the time of sexual contact.²¹⁵ While states began eliminating such exceptions in their state criminal codes in the 1970s, the Model Penal Code still contained a provision excluding non-virgin girls from protection until the 1980s.²¹⁶

²¹¹ See generally Coontz (n 143) at 158; Syrett (n 147) at Chapter 5; ME Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920* (The University of North Carolina Press 2000).

²¹² See Cott (n 143) at Chapter 6.

²¹³ See generally Coontz (n 143) at 153-158.

²¹⁴ See generally M Goodwin, ‘Law’s Limit: Regulating Statutory Rape Laws’ [2013] *Wisconsin Law Review* 481; S Petroni, M Das and SM Sawyer, ‘Protection versus Rights: Age of Marriage versus Age of Sexual Consent’ (2019) 3 *The Lancet Child & Adolescent Health* 274.

²¹⁵ See eg. C Cocca, ‘Chapter 1: Statutory Rape Laws in a Historical Context’, *Jailbait the politics of statutory rape laws in the United States* (Albany: State University of New York Press 2004).

²¹⁶ R Oliveri, ‘Statutory Rape Law and Enforcement in the Wake of Welfare Reform’ (2000) 52 *Stanford Law Review* 463 at 467.

An examination of marriage-age laws illustrates an even more troubling paradox: in a majority of states, children who are under the age of sexual consent can legally marry.²¹⁷ In 36 states, marriage is a partial or complete exemption from the statutory rape law, meaning an adult can legally engage in sexual relations with a child to whom they are married regardless of the state's age restrictions for sex.²¹⁸ Even more bizarrely, in some states, there is no marital exemption for statutory rape, yet children under the age of sexual consent can still legally marry.²¹⁹ Marital exemptions for state statutory rape laws will be discussed in greater detail in Chapter 3.1.

Statutory rape exemptions are not merely employed by individuals wishing to engage in sex with underage parties; victims' families and judges have also used these laws to quite literally force parties into marriage under the threat of criminal conviction. Cases throughout the 18th century show that the families of underage girls initiated statutory rape prosecutions in an effort to pressure the adult male perpetrator to marry the victim, usually in the case of pregnancy.²²⁰ As reported by sociologist William Whyte in his 1930s report on Italian neighborhoods in the eastern United States, "a man who takes her virginity from a 'good girl,' seriously affecting her marriageability, will marry her because he is responsible. ... [If a girl] enjoys a good reputation, her family will be able to exert a good deal of pressure to force a marriage."²²¹ Prosecutorial authorities and judges in such cases turned a blind eye to the unions, even though the sex between the parties classified as statutory rape. In an effort to "right the ruin" of an unmarried girl, judges and prosecutors in some cases actively coerced men to marry their underage victims. For example, in a 1906 New York case, an Assistant District Attorney instructed a defendant to produce a marriage certificate within two days or face prosecution for rape. When the man later filed for divorce on the grounds that the prosecutor had coerced him into marriage, the District

²¹⁷ See Statute Compendium A and D.

²¹⁸ Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin. Statute Compendiums A and D; see also K Van Roost, M Horn and A Koski, 'Child Marriage or Statutory Rape? A Comparison of Law and Practice Across the United States' (2022) 70 *Journal of Adolescent Health* 58.

²¹⁹ Illinois and Wisconsin. Statute Compendiums A and D.

²²⁰ See eg. S Robertson, 'Making Right a Girl's Ruin', *Crimes against children: Sexual violence and legal culture in New York City, 1880-1960* (The University of North Carolina Press 2006); Syrett (n 147) at Chapter 6.

²²¹ WF Whyte, 'A Slum Sex Code' (1943) 49 *American Journal of Sociology* 24; see also Robertson (n 220).

Attorney's office asserted that they "had merely followed the precedent established in the police courts and the Court of General Sessions in similar cases."²²²

It was clearly a common practice at the time for state officials to force a marriage under the threat of prosecution. In fact, legal historian Steven Robertson found that 30% of the statutory rape cases he surveyed between 1896 and 1926 included "an effort to resolve a case by means of a marriage or by a financial payment in lieu of marriage."²²³ In one such case, *Sickles v. Carson*, a husband sought an annulment for his marriage on the grounds that he had only married because he had been threatened with prosecution under a charge of "bastardy" and therefore he had not truly consented to the marriage. The family court however found that this was insufficient to grant an annulment stating:

If a single man, who is in lawful arrest under a bona fide regular proceeding in bastardy on the examination of a single woman, chooses, as a means of avoiding the legitimate consequences of the proceeding, to marry her, surely he cannot be permitted to relieve himself of the obligations which he thus assumes, merely on the ground that he, at the time of the marriage, was under such arrest. The arrest is not, of itself, enough in such a case to constitute duress of imprisonment.²²⁴

Such decisions highlight not only the deep, traditional ideals at play within the legislative and judicial systems about the relationship between sex and marriage, but also entrenched fiscal fears in relation to unwed motherhood. Under the major welfare reform campaigns of the 1990s, the federal government passed much of the responsibility for welfare allocation to state governments through programs such as the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). PRWORA expressly aimed at reducing "nonmarital births" and pushed aggressively for the prioritization of marriage stating that, "Marriage is the foundation of a successful society...[and] an essential institution of a successful society which promotes the interests of children."²²⁵ The Act included language specifically encouraging states to enforce

²²² 'Wed When Jerome's Aide Threatened Jail' *New York American* (4 May 1906); see also Robertson (n 220).

²²³ Robertson (n 218) at 99.

²²⁴ *Sickles v Carson* (1875) 26 NJ Eq 440 (New Jersey).

²²⁵ Congressional Record, House of Representatives, 30 July 1996.

statutory rape laws in an effort to reduce teen pregnancy.²²⁶ In line with legislation such as the PRWORA, the federal government began offering “illegitimacy bonuses” incentivizing states to lower out-of-wedlock childbirth rates in exchange for greater financial support.²²⁷ State programs such as “Bridefare” in Wisconsin offered an increase in cash welfare benefits to teenage welfare recipients if they married, regardless of if the pregnancy resulted from rape.²²⁸ The Bridefare program was championed by Tommy Thompson, who was later appointed by George Bush Jr. to implement a federal campaign for marriage promotion.²²⁹

The government’s interest in fiscal policy over child protection is made particularly evident through the application of statutory rape law. The court in *Michael M. v. Sonoma Country Superior Court* officially recognized that the State’s interest in preventing welfare payments to unwed mothers was a primary reason behind statutory rape laws, reasoning the court found to be entirely legitimate.²³⁰ We can see the financial motivations behind statutory rape law most notably in the differential treatment of male victims. Underage boys who father children with adult women have been given less, and often none, of the protections offered to girls.²³¹ Judges in these cases have overlooked entirely the boy’s capacity to consent to sexual activity, and instead are primarily concerned with the potential burden on the State posed by the conceived baby. In the case *San Luis Obispo v. Nathaniel J*, a 15-year-old boy was ordered to pay child support to a 30-year-old woman who had become pregnant by him. While the sexual contact between the parties certainly qualified as statutory rape under the criminal law, the California Court of Appeal’s denied the boy’s victimhood entirely, stating that he was “not an innocent victim of the defendant’s criminal conduct” and that “he was injured as a result of criminal conduct in which he willingly participated.”²³² In another decision, the court in *State ex. rel Hermesmann* ordered that a 13-year-old boy be ordered to pay child support to his adult abuser, declaring that “the State’s interest in requiring minor parents to support their children overrides the State’s

²²⁶ Personal Responsibility and Work Opportunity Reconciliation Act 1996, Public Law No. 104 - 193; *see also* Oliveri (n 216).

²²⁷ *ibid* at 500.

²²⁸ *See* M Wiseman, ‘State Strategies for Welfare Reform: The Wisconsin Story’ (1996) 15 *Journal of Policy Analysis and Management* 515; *see also* C Baker and N Stein, ‘Obscuring Gender-Based Violence: Marriage Promotion and Teen Dating Violence Research’ (2016) 37 *Journal of Women, Politics & Policy* 87.

²²⁹ *See* A Prud’homme, ‘Social Programs: Learn, Work and Wed’ *TIME* (19 August 1991).

²³⁰ *Michael M v Sonoma Country Superior Court* (1981) 450 US 464 (US Supreme Court).

²³¹ *See generally* Oliveri (n 215) (discussion of minimal protections of boys in statutory rape cases.)

²³² *County of San Luis Obispo v Nathaniel J* (1996) 50 Cal App 4th 842 (California Court of Appeals).

competing interest in protecting juveniles from improvident acts, even when such acts may include criminal activity on the part of the other parent.”²³³

With such a long history of startling cases, it is puzzling that the “shotgun wedding” has not come under greater scrutiny as a form of non-consensual marriage. However, in the eyes of the general public and many legislators, such a marriage may seem “the lesser of two evils”, and the better decision when facing a pregnancy with unwed parents. Indeed, in their effort to eliminate child marriage, advocates say that the main impediment to enacting legislation is the concern of policymakers for cases of teenage pregnancy.²³⁴ To these legislators, while preventing forced marriage may sometimes be a worthy goal, any marriage at all will still result in better outcomes for pregnant children.

Perhaps surprisingly, the available data points in fact to the opposite conclusion: pregnant girls who remain single have significantly better long-term outcomes in health, education, and financial security than those who marry.²³⁵ When presented with this evidence however, many legislators reject the findings wholesale, as we shall see in Chapter 3.1. Indeed, several states still have an exemption to their marriage-age laws specifically for pregnant children.²³⁶ For many, no amount of research or data can override the deeply entrenched views on motherhood and marriage that have been embedded in US society and legal history. It is little surprise then that these cases are almost entirely excluded from the discourse on forced marriage.

Conclusions

As this chapter has evidenced, non-consensual marriage is an under-researched and widely misunderstood element of the US family law landscape. Advocates fighting for reform have attempted to sway this limited perspective, and survivors from a wide variety of backgrounds, such as prominent activists Fraidy Reiss and Sherry Johnson, have come forward with their

²³³ *State ex Rel Hermesmann v Seyer* (1993) 252 Kan 646 (Kansas).

²³⁴ See Chapter 3.1

²³⁵ See eg. GB Dahl, ‘Early Teen Marriage and Future Poverty’ (2010) 47 *Demography* 689; JA Talbott, ‘Child Marriage in the United States and Its Association with Mental Health in Women’ (2013) 2013 *Yearbook of Psychiatry and Applied Mental Health* 220; A Wahi and others, ‘The Lived Experience of Child Marriage in the United States’ (2019) 34 *Social Work in Public Health* 201.

²³⁶ See Statute Compendium A.

stories to shift the narrative to a broader understanding of forced marriages.²³⁷ However, limited understanding of both the general public and legislators hold back reform efforts. Over 80 years after the marriage of Charlie and Eunice Johns, legislators have made little progress in their conceptualization of forced marriage than the sensationalized headlines of the 1920s, declaring it a bastion of “the Orient.” If law makers and legal advocates cannot broaden their perspectives on marital consent, we risk repeating the same patters that have emerged throughout US history. Untold numbers of victims of non-consensual unions, such as those pressured to marry after a pregnancy, will remain unseen, while religious and cultural communities will bear the brunt of the public’s vilification.

²³⁷ See eg. M Basu, ‘Sherry Johnson Was Raped, Pregnant and Married by 11. Now She’s Fighting to End Child Marriage in America’ *CNN* (29 January 2018); SG Freedman, ‘Woman Breaks through Chains of Forced Marriage, and Helps Others Do the Same’ *The New York Times* (20 March 2015).

1.4 The Right to Marry and Constitutional Considerations

It is clear from the historical analysis in the previous chapter that marriage holds a place of unique significance in the eyes of lawmakers, judges, and the American public. This prioritization of marriage has come to be enshrined in the Constitutionally protected “right to marry.” While the US Supreme Court has continually expounded on the importance of such a right in recent cases, the actual application, and in fact existence, of a right to marry is in fact murky. Even more unclear is how this law might apply to the limitations on marriage that shall be discussed in later portions of this thesis.

This chapter therefore aims to provide a background on the so-called “right to marry” under US constitutional law. First, it will provide a brief introduction to the concepts of due process and equal protection, which underpin the right to marry as it exists today. Then it will analyze the evolution of the fundamental right to marry under the Due Process Clause and its current standing in US jurisprudence. These constitutional standards will then be applied to limitations on the right of children and persons with mental disabilities to marry in subsequent chapters.

Due Process and Equal Protection Under the US Constitution

States have historically been the primary deciders of family law within their boundaries, as evidenced by the divergent approaches to marriage and dissolution as described in the previous two chapters. The Supreme Court has however had a significant effect on family law through its rulings on the constitutionality of state restrictions on domestic relations. It is necessary at this stage, for audiences not familiar with US constitutional legal interpretation, to introduce the principles of due process and equal protection. The 14th Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²³⁸

²³⁸ US Constitution, Amendment 14, Section 1.

“Equal protection” under this provision has been interpreted as preventing particular social groups from facing differing treatment under the law without adequate justification. While originally seen as a “last resort” analysis in determining the constitutionality of a law, equal protection emerged in the 20th Century as the predominant analysis used by the Court.²³⁹ Equal protection rationale underpinned a wide variety of the Court’s most progressive decisions, especially during the Civil Rights Era. Momentous cases such as *Brown v. the Board of Education of Topeka*,²⁴⁰ *Bolling v. Sharpe*,²⁴¹ and *Cooper v. Aaron*²⁴² prohibited the segregation of public schools under equal protection rationale and reshaped race relations across the US. *Craig v. Boren*²⁴³ and *US v. Virginia*²⁴⁴ likewise applied equal protection analysis to gender-based discrimination and secured women across the US previously unimaginable protections in the workplace and educational institutions. These cases are not without criticism, with commenters noting the uneven application of equal protection doctrine throughout the Court’s jurisprudence.²⁴⁵ However, it is indisputable that the Court’s equal protection cases have had a drastic effect on American society and the welfare of many social groups.

The modern application of the equal protection doctrine requires an analysis under three categories of scrutiny, depending on the social class affected. Distinctions relating to “suspect classes”, including race, national origin, religion, and alienage receive strict scrutiny, which requires that the state regulation be narrowly tailored to suit a compelling government interest.²⁴⁶ Distinctions relating to gender and legitimacy receive intermediate scrutiny, which requires that the regulation be substantially related to an important government interest.²⁴⁷ Finally, all other social categorizations need only meet rational basis scrutiny, where the regulation requires only a rational relation to a legitimate government interest.²⁴⁸

²³⁹ See M Klarman, ‘An Interpretive History of Modern Equal Protection’ (1991) 90 Michigan Law Review 213 at 214.

²⁴⁰ *Brown v Board of Education of Topeka* (1954) 347 US 483 (US Supreme Court).

²⁴¹ *Bolling v Sharpe* (1954) 347 US 497 (US Supreme Court).

²⁴² *Cooper v Aaron* (1958) 358 US 1 (US Supreme Court).

²⁴³ *Craig v Boren* (1976) 429 US 190 (US Supreme Court).

²⁴⁴ *US v Virginia* (1996) 518 US 515 (US Supreme Court).

²⁴⁵ See eg. Klarman (n 597); R Robinson, ‘Unequal Protection’ (2016) 68 Stanford Law Review 151; R Colker, R Colker, ‘An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class’ [1991] Duke Law Journal 324.

²⁴⁶ See eg. *Grutter v Bollinger* (2003) 539 US 306 (US Supreme Court); *Brown v. Board of Education of Topeka* (n 240).

²⁴⁷ See eg. *US v. Virginia* (n 244); *Craig v. Boren* (n 243).

²⁴⁸ See eg. *Williamson v Lee Optical Co* (1955) 348 US 483 (US Supreme Court); *Romer v Evans* (1996) 517 US 190 (US Supreme Court).

Traditional strict scrutiny requires that the law infringing on a fundamental right be narrowly tailored to support a compelling government interest. Cases that have passed strict scrutiny are relatively rare, with Winkler's empirical survey of relevant cases determining that in federal courts, only 30% of laws are upheld when placed under strict scrutiny analysis.²⁴⁹ The standard has gained the reputation amongst constitutional scholars as "strict in theory, fatal in fact."²⁵⁰

For the first prong of strict scrutiny analysis, the state must show that a restriction on the right to marry is driven by a compelling government interest. The Court has never specifically defined how we can determine if an interest is compelling and as Professor Richard Fallon Jr. states, "Although the modern strict scrutiny formula applies widely, its origins are generally unknown, its interpretation is more varied than is often recognized, its ultimate aims are disputed, and its conceptual presuppositions are widely misunderstood."²⁵¹ From the limited and uneven precedent, we can ascertain that the Court has at least upheld laws under strict scrutiny if the statute is designed to protect a large number of human lives. In one such case, *Korematsu v United States*, the Court ruled that the internment of Japanese Americans during WWII passed strict scrutiny because of a national security concern.²⁵² In another, the Court found a compelling government interest in curbing the sale of unapproved prescription drugs that posed significant risk to human life.²⁵³

Even if the government is able to establish a compelling interest it will still need to demonstrate that any restriction of the right is narrowly tailored to suit that interest. As with the "compelling interest" terminology, the Court has not provided a concrete test of when a law is narrowly tailored. However, the Court has elucidated that in order to pass strict scrutiny, the government

²⁴⁹ Winkler, A, 'Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts' (2006) 59 Vanderbilt Law Review 793.

²⁵⁰ See eg. C Fisher, "'Strict in Theory, Fatal in Fact': The Phrase That Rings True in Recent Voting Rights Cases' (2023) 54 Pacific Law Review 391; see also Winkler, A (n 249).

²⁵¹ R Fallon Jr., 'Strict Judicial Scrutiny' (2007) 54 UCLA Law Review 1267.

²⁵² *Korematsu v United States* (1944) 323 US 214 (US Supreme Court). Note that while this case has not been officially overturned, it is well-recognized that the Court's finding of a compelling national security concern posed by Japanese Americans was based on deeply racist and xenophobic views. It is referenced only to demonstrate an example of the Court's finding of a sufficient government interest to pass strict scrutiny, not as an endorsement of the Court's reasoning.

²⁵³ *Abigail Alliance for Better Access to Developmental Drugs v von Eschenbach* (2008) 552 US 1159 (US Supreme Court).

must show that the law is “necessary”²⁵⁴ and represent the “least restrictive alternative”²⁵⁵ to achieve the state’s goal. Further, the Court’s rulings indicate that a regulation will be deemed impermissible if it is underinclusive, meaning that it does not regulate activities that present substantially similar risks to the state’s compelling interest as the conduct prohibited by the statute.²⁵⁶ For instance, in *Church of Lukumi v. City of Hialeah*, the Court concluded that “It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest ‘of the highest order’...when it leaves appreciable damage to that supposedly vital interest unprohibited.”²⁵⁷

In stark contrast to strict scrutiny, rational basis scrutiny requires only that a law be “rationally related” to a “legitimate” government interest. This is an exceptionally broad standard and the lowest level of Constitutional review, which defers greatly to legislators. As summarized by Nachbar, rational basis review is in many cases virtually “no review at all.”²⁵⁸ The Court has never expressly declared what constitutes a legitimate government interest but has concluded that a wide range of state objectives can constitute such an interest.²⁵⁹ In determining if a law is “rationally related” to such a legitimate interest, the standard appears even more broad, with the Court holding that permissible statutes can be based on “rational speculation unsupported by evidence or empirical data.”²⁶⁰

The Court has applied such scrutiny analysis to not just equal protection cases, but in matter related to due process under the 14th Amendment as well. Due process has been interpreted less through the lens of the particular social group affected by a law and more by the particular right affected.²⁶¹ Within due process, the Court has identified two categories: 1) procedural due

²⁵⁴ See *Kramer v Union Free School District No 15* (1969) 395 US 621, 632 (US Supreme Court) (“The classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated goal.”; see also *Republican Party of Minnesota v White* (2002) 536 US 765 (US Supreme Court).

²⁵⁵ See eg. *Sable Communications v FCC* (1989) 492 US 115 (US Supreme Court) (“The Government may...regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restriction means to further the articulated interest”).

²⁵⁶ See Fallon Jr. (n 251).

²⁵⁷ *Church of Lukumi Babalu Aye, Inc v City of Hialeah* (1993) 508 US 520 (US Supreme Court).

²⁵⁸ T Nachbar, ‘The Rationality of Rational Basis Review’ (2016) 102 Virginia Law Review 1627.

²⁵⁹ See eg. J McGoldrick Jr., ‘The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective’ (2018) 55 San Diego Law Review 751.

²⁶⁰ *Federal Communications Commission v. Beach Communications Inc* (1993) 508 US 307, 315 (US Supreme Court).

²⁶¹ See eg. RW Galloway, ‘Basic Substantive due process Analysis’ (1992) 26 University of San Francisco Law Review 625; W Musgrove, ‘Substantive Due Process: A History of Liberty in the Due Process Clause’ (2008) 2 St. Thomas Journal of Law and Public Policy 125.

process rights, which relate to the right of an individual to fair process when facing such government actions as criminal prosecution and eminent domain proceedings²⁶² and 2) substantive due process rights. Substantive due process rights are perhaps the most controversial of all constitutional rights, as they are unenumerated and Court-constructed.²⁶³ The concept originated from the decision in *Allgeyer v. Louisiana*, where the Court concluded that Due Process Clause does require that deprivations of life, liberty, or property be substantively reasonable.²⁶⁴ That is to say, certain interests that are not specifically mentioned in the Constitution's text can still be protected if they are sufficiently tied to an individual's "life, liberty, or property" interest.²⁶⁵ As summarized by the Court in *Allegeyer*:

The liberty mentioned in [the fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper ...²⁶⁶

From this foundation, the Court has identified certain substantive due process rights that are considered to be "fundamental." Fundamental rights were traditionally limited to those specifically enumerated in the Constitution, such as those outlined in the First Amendment's Freedom of Speech and Free Exercise Clauses.²⁶⁷ However, over the past century, the Court has significantly expanded this concept to include unenumerated rights determined to be fundamental. If the Court concludes that a right is "implicit in the concept of ordered liberty" and/or "deeply rooted in [the] Nation's history and tradition", the right can be considered fundamental.²⁶⁸ Infringements of fundamental rights, enumerated or unenumerated, are all

²⁶² See eg. *Gideon v. Wainwright* (1963) 372 US 335 (US Supreme Court); *Morrissey v. Brewer* (1972) 408 US 471 (US Supreme Court); *Cleveland Board of Education v. Loudermill* (1985) 470 US 532 (US Supreme Court).

²⁶³ See generally E Chemerinsky, 'Substantive Due Process' (1999) 15 *Touro Law Review* 1501; R Williams, 'The One and Only Substantive Due Process Clause' 120 *Yale Law Journal* 408; D Conkle, 'Three Theories of Substantive Due Process' (2006) 85 *North Carolina Law Review* 63.

²⁶⁴ *Allgeyer v. Louisiana* (1897) 165 US 578 (US Supreme Court).

²⁶⁵ See Galloway (n 261) at 631.

²⁶⁶ *Allgeyer v. Louisiana* (n 264).

²⁶⁷ See eg. *Tinker v. Des Moines Independent Community School* (1969) 393 US 503 (US Supreme Court); *Citizens United v. Federal Election Commission* (2010) 558 US 310 (US Supreme Court).

²⁶⁸ See eg. *Dobbs v. Jackson Women's Health Organization* (2022) 597 US 215 (US Supreme Court) (finding that abortion access is not deeply rooted in American tradition, and therefore not a fundamental right.)

generally required to pass strict scrutiny.²⁶⁹ The Court has clarified that even indirect interference with a fundamental right is impermissible unless the government can pass strict scrutiny analysis.²⁷⁰ If, however, the right is not fundamental, it receives only rational basis review.²⁷¹ Over time, the Court has identified three areas for the application of substantive due process: incorporation rights, economic rights, and privacy rights.²⁷²

Incorporation is a tool by which the Court applies rights outlined in the federal Constitution against the states. While historically states were not bound by the provisions of the federal Constitution, beginning with *Duncan v. State of Louisiana*,²⁷³ the Court has concluded that due process requires that states are bound to respect certain individual rights enshrined in the US Constitution. Since *Duncan*, all Bill of Rights Amendments have been incorporated to the states through the Due Process Clause,²⁷⁴ save the third, ninth, and tenth.²⁷⁵

The next form of substantive due process, economic due process, has waxed and waned in its application throughout the last century. The right originated in the Contracts Clause of Article I, which prohibits the passing of “any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts.”²⁷⁶ Throughout the 1800s, courts began to interpret this language to include a “right to contract” implicit within the 14th Amendment’s Due Process Clause. For instance, in *Frisbie v. United States*, the Court declared that “generally speaking, among the inalienable rights of the citizen is that of the liberty of contract.”²⁷⁷ The right, applied strictly to economic contracts, protected the right to “enjoyment upon terms of equality with all others in

²⁶⁹ See eg. *Roe v Wade* (1973) 410 US 113 (US Supreme Court). An exception exists for content-neutral restrictions (time, place, and manner) restrictions on free speech in public forums. These regulations must pass only heightened intermediate scrutiny analysis, which requires that such a regulation be narrowly tailored to serve an important government and leave open alternative methods of communication. See eg. *Ward v Rock Against Racism* (1989) 491 US 781 (US Supreme Court).

²⁷⁰ *Shapiro v Thompson* (1969) 394 US 618 (US Supreme Court).

²⁷¹ Specifics of strict scrutiny and rational basis analyses are discussed in the following sections.

²⁷² Musgrove (n 261) at 126.

²⁷³ *Duncan v State of Louisiana* (1968) 391 US 145 (US Supreme Court).

²⁷⁴ ‘Application of the Bill of Rights to the States Through the Fourteenth Amendment and Selective Incorporation’ (Congressional Research Service 2024).

²⁷⁵ The third Amendment prohibits the quartering of soldiers in private residences; states do not maintain militaries, so this is largely not applicable to state governments. The ninth Amendment protects the rights of the people that are not explicitly stated in the Constitution and is therefore not necessary to be incorporated. The tenth Amendment limits federal power to specifically those provisions enumerated in the Constitution, so also does not apply to states and is not appropriate for incorporation.

²⁷⁶ US Constitution Art. I Sec. 10

²⁷⁷ *Frisbie v United States* (1895) 157 US 160 (US Supreme Court).

similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, as an essential part of [the] rights of liberty and property.”²⁷⁸

The right to contract, or “liberty of contract” doctrine, served as the underpinning of the ruling in the now infamous case *Lochner v. New York*, where the Court ruled that a state regulation on the maximum hours for bakers interfered with the right and violated due process.²⁷⁹ Later in *Adkins v. Children’s Hospital*, the Court, while invalidating a state’s protection of a minimum wage for women, definitively stated that “freedom of contract is...the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.”²⁸⁰ The Court in *Adkins* laid out specific principles that must be met by a state statute in order for a state to interfere with the right to contract, including: 1) “those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest”, 2) “statutes relating to contracts for the performance of public work, 3) “statutes prescribing the character, methods and time for payment of wages” and 4) “statutes fixing hours of labor” to preserve the health and safety for workers or the public at large.²⁸¹ From the decision in *Adkins*, a wave of cases cemented the right to contract and limited the ability of states to interfere with contractual relations.²⁸²

The rise of the right to contract halted abruptly in the 1930s. First, the Court’s stated in *Nebbia v. New York* that:

The general rule [as applied to when a state may regulate economics] is that [use of property and freedom of contract] shall be free of governmental interference. But neither property rights nor contract rights are absolute...The guaranty of due process...demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained...The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. ²⁸³

²⁷⁸ *Powell v Pennsylvania* (1888) 127 US 678 (US Supreme Court).

²⁷⁹ *Lochner v New York* (1905) 198 US 45 (US Supreme Court).

²⁸⁰ *Adkins v Children’s Hospital* (1923) 261 US 525 (US Supreme Court).

²⁸¹ *ibid.*

²⁸² *See eg. Jay Burns Baking v Bryan* (1924) 264 US 504 (US Supreme Court); *New State Ice v Liebmann* (1932) 285 US 262 (US Supreme Court); *Pierce v Society of Sisters* (1925) 268 US 510 (US Supreme Court).

²⁸³ *Nebbia v New York* (1934) 291 US 502 (US Supreme Court).

The final blow to the *Lochner* era of economic due process cases came with the Court's decision in *West Coast Hotel Co. v. Parish* in 1937, which explicitly overturned *Adkins* and upheld a minimum wage for women.²⁸⁴ The decision reflected a post-Depression concern for worker conditions and compensation.²⁸⁵ The Court therefore downgraded the scrutiny applied to the right to contract from the specific requirements of *Adkins* to merely rational basis review.²⁸⁶ The Court applied this reason again in *Williamson v. Lee Optical of Oklahoma*, cementing the right to contract as falling under rational basis review and definitively overturning *Lochner*.²⁸⁷

From this brief overview of the right to contract, we see that the Court has only applied the right, at whatever scrutiny level, to contracts of a purely economic nature. It is unclear if the Court would consider the marriage contract as falling under the right. It would certainly seem at odds with the Court's finding of marriage itself as a fundamental right, as we will see in the next section. However, marriage as viewed as a contract between individuals, which can also involve significant financial repercussions, could be argued to fall under the right to contract. More on the potential of marriage to fall under the right to contract is discussed below.

Finally, and perhaps most relevant to the evaluation of the right to marry, is the broad category of rights falling under "privacy."²⁸⁸ The first definitive finding of a right to privacy implicit in the Constitution comes from Justice Douglas's opinion in *Griswold v. Connecticut* where he stated "...the right of privacy which presses for recognition here is a legitimate one.... We deal with a right of privacy older than the Bill of Rights."²⁸⁹ Since *Griswold*, the Court has applied the "right to privacy" to strike down laws attempting to restrict parental control of children,²⁹⁰ procreation,²⁹¹ and private sexual activity.²⁹² Application of the "right to privacy" suddenly gave the Court authority to overturn laws that would have traditionally been within the police power of states to regulate family and health-related matters in the name of individual liberty.

²⁸⁴ *West Coast Hotel Co v Parrish* (1937) 300 US 379 (US Supreme Court).

²⁸⁵ D Bernstein, 'Freedom of Contract' [2008] George Mason University Law and Economics Research Paper Series.

²⁸⁶ *West Coast Hotel Co. v. Parrish* (n 284).

²⁸⁷ *Williamson v. Lee Optical Co* (n 248).

²⁸⁸ See eg. *Dobbs v. Jackson Women's Health Organization* (n 268) ., overturning *Roe v. Wade* (n 269) ..

²⁸⁹ *Griswold v Connecticut* (1965) 381 US 479 (US Supreme Court).

²⁹⁰ See eg. *Pierce v. Society of Sisters* (n 282).

²⁹¹ See eg. *Skinner v Oklahoma* (1942) 316 US 535 (US Supreme Court).

²⁹² See eg. *Lawrence v Texas* (2003) 539 US 558 (US Supreme Court).

However, the doctrine has always been controversial, and currently faces its most extreme scrutiny to date. For example, the pivotal case *Roe v. Wade* determined that serious restrictions on abortion access violated the right to privacy, as individuals had a privacy interest in procreation.²⁹³ There, the Court stated:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate a pregnancy.²⁹⁴

However, *Roe* was overturned, to wide public outcry, by *Dobbs v. Jackson Women's Health Organization* in 2022, where the Court concluded that abortion access was not a fundamental right, as it is not “deeply rooted in this Nation's history and tradition.”²⁹⁵ While *Dobbs* did not eliminate the right to privacy as a concept, many see the decision as the first stab at dismantling the right to privacy and returning issues related to sexual health and family relations to the states.

Finally, separate from due process or equal protection analysis, the Court has ruled that, a law may still be void if it is overbroad or impermissibly vague. While predominantly applied to criminal statutes, the Court’s decisions on such laws create broad language that can be applied to a variety of civil legal regulations. For instance, in *Connally v. General Construction Co.*, the Court ruled that a statute is impermissibly vague if “men of common intelligence must guess at its meaning.”²⁹⁶ A plain reading of the statute must be sufficient for the general populous to understand the regulation. The Court further expanded the prohibition on vagueness to require specificity in the populations affected by the law, stating that a law was impermissibly vague if there is “uncertainty in regard to persons within the scope of the act.”²⁹⁷ Finally *Federal Communications Commission v. Fox Television Stations, Inc.* held that when a law does not

²⁹³ *Roe v. Wade* (n 269).

²⁹⁴ *ibid.*

²⁹⁵ *Dobbs v. Jackson Women's Health Organization* (n 268).

²⁹⁶ *Connally v General Construction Co* (1926) 269 US 385 (US Supreme Court).

²⁹⁷ *Musser v Utah* (1948) 333 US 95 (US Supreme Court).

specifically enumerate the practices that are either required or prohibited, the ordinary citizen does not know what the law requires and the statute is therefore void.²⁹⁸

Evolution of the Fundamental Right to Marry/Marriage

With this brief background established, we turn to the evolution of the fundamental “right to marry” (or potentially the fundamental “right to marriage”) under Supreme Court jurisprudence. While the Court has repeatedly expounded that the fundamental right to marry is deeply rooted in its precedents, the history of the right illustrates a murkier evolution and unclear boundaries of what the right actually encompasses.

The Court’s recognition of marriage as a critical interest warranting Constitutional protection dates back to the 1800s. In *Maynard v. Hill*, the Court found marriage to be “an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”²⁹⁹ The Court did not provide specific reasoning on why marriage is so vital to American society, but rather espouses this language as a universal truth. This extreme prioritization of the institution of marriage without additional justification for the reasoning behind this prioritization is repeated throughout the Court’s jurisprudence, as we shall see.

Later in *Travers v. Reinhardt*, the Court more concretely elucidated when a marriage would rise to Constitutional protection. The case involved a couple who believed that they were married, but unbeknownst to the spouses, the official who had administered the marriage was in fact incapable of solemnizing the union under the law.³⁰⁰ The state voided the couple’s marriage for lack of proper marital procedure, but the Court overturned this decision, stating that the “two essentials of a valid marriage are capacity and consent” and that once these elements could be properly established, the state could not invalidate the union between the parties for lack of process.³⁰¹

Myers v. Nebraska, while not a case involving a dispute over a marital restriction, includes in its language the first suggestion of marriage as a substantive due process right stating:

²⁹⁸ *Federal Communications Commission v Fox Television Stations, Inc* (2012) 567 US 239 (US Supreme Court).

²⁹⁹ *Maynard v Hill* (1888) 125 US 190 (US Supreme Court).

³⁰⁰ *Travers v Reinhardt* (1907) 205 US 423 (US Supreme Court).

³⁰¹ *ibid.*

“Without doubt [due process] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry*, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”³⁰²

The Court moved even closer to declaring a definitive fundamental right to marry through its equal protection cases throughout the mid-1900s. In its language in *Skinner v. Oklahoma*, overturning the constitutionality of state sterilization of convicts, the Court stated that “marriage and procreation are fundamental to the very existence and survival of the race.”³⁰³ Similarly, in *Griswold v. Connecticut*, dealing with the right of married couples to seek contraception, the Court emphasized in reference to marriage:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.³⁰⁴

The language in *Loving v. Virginia* is sometimes cited as the Court’s first definitive declaration of the right to marry as fundamental.³⁰⁵ However, the case was in fact decided on equal protection grounds rather than a due process analysis; the Court determined that restrictions on interracial marriage did not pass equal protection scrutiny as applied for restrictions based on race.³⁰⁶

³⁰² *Meyer v Nebraska* (1923) 262 US 390 (US Supreme Court) (citations omitted; emphasis added).

³⁰³ *Skinner v. Oklahoma* (n 291).

³⁰⁴ *Griswold v. Connecticut* (n 289).

³⁰⁵ See eg. JC Atkinson, ‘Califano v. Jobst, Zablocki v. Redhail, and the Fundamental Right to Marry’ (1979) 18 *Journal of Family Law* 587.

³⁰⁶ *Loving v Virginia* (1967) 388 US (US Supreme Court) (“To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by

However, the Court's language that "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"³⁰⁷ indicated a further step towards a complete recognition of the fundamental right to marry.

The Court continued to emphasize the importance of marriage post-*Loving* but fell short of declaring the right to marry as a fundamental due process right in itself. In *Boddie v. CT*, the Court held that indigent petitioners cannot be denied divorce due to inability to pay a fee, stating that "marriage involves interests of basic importance to our society" and is "a fundamental human relationship."³⁰⁸ In dicta in *Cleveland Board of Education v. LaFleur*, the Court stated "[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."³⁰⁹ However, as evidenced above, this statement seems hyperbolic, as all previous Court decisions on the protection of marriage rights had been decided on equal protection, rather than due process, grounds.

The breadth of the right to marry, whether it was in fact fundamental at this stage or not, was challenged in *Califano v. Jobst*, where the Court ruled that the Social Security Administration did not violate the right to marriage by terminating benefits for a disabled individual who married.³¹⁰ The Court, applying only rational basis scrutiny under equal protection analysis, found "no evidence that the [SSA's] laws significantly discourages, let alone made practicably impossible, any marriages."³¹¹ If the Court imagined that the right to marry was at this stage fundamental, it still did not apply fundamental due process analysis to the right in *Califano*. It is as a result of this ruling that the Marriage Equality for Disabled Adults Act and Supplemental Security Income Restoration Act, discussed in Chapter 2.2, seek to codify the right of disabled individuals to marry without affecting their Social Security income.

invidious racial discriminations...Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.")

³⁰⁷*ibid.* Other cases including language about the importance of marriage in the mid-20th century include *Boddie v. Connecticut* (1971) 401 US 371 (US Supreme Court) ("Marriage involves interests of basic importance to our society" and is "a fundamental human relationship."); *Carey v. Population Services International* (1977) 431 US 678 (US Supreme Court).

³⁰⁸ *Boddie v. Connecticut* (n 307).

³⁰⁹ *Cleveland Board of Education v. LaFleur* [1974] US Supreme Court 414, US 632.

³¹⁰ *Califano v. Jobst* (1977) 434 US 47 (US Supreme Court).

³¹¹ *ibid.*

The Court more clearly indicated the existence of the fundamental right to marry under due process in *Zablocki v. Redhail*, where it stated that the right to marry was a “fundamental interest” that necessitates “critical examination” of governmental restrictions that “interfere directly and substantially” with the right.³¹² The case dealt with a Wisconsin law that prohibited an individual currently under a child support order from seeking a marriage license without court approval. The Court determined that the challenged law was not “closely tailored” to effectuate only “sufficiently important state interests”.³¹³ This language does not precisely mirror the standard for strict, intermediate, or rational basis scrutiny, as laid out above. Nevertheless, the Court held that while the petitioner’s equal protection rights were not necessarily violated, the due process right to marry was significantly interfered with, and therefore impermissible.³¹⁴ In his concurrence, Justice Stevens highlighted a difference between classifications based on the marriage relationship, which he argued can be regulated by the state (such as the law in *Califano*) and those that determine who can enter the relationship, which should be subject to a higher level of scrutiny.³¹⁵

The Court’s ruling in *Zablocki* provides the only specific language of the test applied by the court on the fundamental right to marry and states that a restriction on the right will be found unconstitutional. As scholars such as LeFrancois have hypothesized, the Court’s language in *Zablocki* indicates that such analysis will be applied only when a law poses a “significant interference” with the right to marry.³¹⁶

The *Zablocki* test language seems to indicate a lower threshold than traditional strict scrutiny. Certainly, an “important” state interest is defined through significant precedent as the standard of only intermediate scrutiny.³¹⁷ The Court has required an “important” interest evaluation in cases related to classifications based on sex³¹⁸ or legitimacy³¹⁹, as well as content-neutral restrictions on

³¹² *Zablocki v Redhail*, (1978) 434 US 374 (US Supreme Court).

³¹³ *ibid.*

³¹⁴ *ibid.*

³¹⁵ *ibid.*, Justice Stevens, concurring.

³¹⁶ A LeFrancois, ‘The Constitution and the Right to Marry: A Jurisprudential Analysis’ (1980) 5 Oklahoma City University Law Review 507.

³¹⁷ See *eg. Craig v. Boren* (n 243).

³¹⁸ See *ibid*; *Mississippi University for Women v Hogan* (1982) 458 US 718 (US Supreme Court).

³¹⁹ See *Trimble v Gordon* (1977) 430 US 762 (US Supreme Court).

speech in public forums (so called “time, place, manner” restrictions.)³²⁰ As with compelling interests, the Court has not specifically enumerated what facts make a government interest “important.” However, it has found such interests as limiting excessive noise in public spaces³²¹ and preventing the disruption of health clinic services³²² as meeting this standard. While it is difficult to determine how the Court would define the difference between a “narrowly tailored” and “closely tailored” interest, the plain meaning would suggest that a “closely” tailored interest is not so stringently defined as “narrowly” tailored.

Since *Zablocki*, the Court has repeatedly stated that the right to marriage is fundamental. The Court’s decisions regarding same-sex marriage cemented the right in its most conclusive terms. First in *US v. Windsor*, the Court ruled that Defense of Marriage Act (DOMA), which denied federal recognition of same-sex marriages, was a violation of substantive due process.³²³ The majority stated, that “the federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”³²⁴ Finally, in *Obergefell v. Hodges*, the Court espoused its most definitive elucidation of the right, stating that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty.”³²⁵

As evidenced by this brief history, while the Court has often repeated the ‘well-accepted’ existence of the right to marry, the actual case precedence is not as clear. While the Court has espoused substantive due process as a fully discrete doctrine from equal protection, and placed the right to marry under that umbrella, the reality of case reasoning is not always so distinct. Critics have argued that the Court’s conclusive language does not match the reality of the right’s evolution. Cain went so far as to state that in fact “[n]o right to marry case has been analyzed and

³²⁰ See *Ward v. Rock Against Racism* (n 615)l; *Madsen v Women’s Health Center, Inc* (1994) 512 US 743 (US Supreme Court).

³²¹ See *Ward v. Rock Against Racism* (n 269).

³²² See *LeFrancois* (n 316).

³²³ *US v Windsor* (2013) 570 US 744 (US Supreme Court). Note that this case was decided under 5th Amendment Due process analysis, rather than 14th, as the matter related to a federal estate tax exemption.

³²⁴ *ibid*; see also D Nejaime, ‘Windsor’s Right to Marry’ (2013) 123 Yale Law Journal Online 219.

³²⁵ *Obergefell v. Hodges* (n 1).

decided as a ‘pure’ substantive due process case.”³²⁶ Mayer-Schonberger points out that cases such as *Skinner*, *Zablock*, and *Eisenstad* are repeatedly hailed as “landmark” substantive due process cases, but the text of these cases in fact shows that equal protection analysis was applied.³²⁷ According to Nowak, Rotunda, and Young, such overlap is not unexpected stating, “The reason for this predominance of the Equal Protection analysis in fundamental rights cases is based on the fact that virtually all laws regulating fundamental rights involve classifications.”³²⁸

LeFrancois likewise states that while marriage is “an area of law that pretends to be so formulaic” the actual existence of a fundamental due process right to marry in constitutional precedent is not well-established.³²⁹ He cites the conflicting holdings in *Califano* and *Zablocki* to illustrate this point: while the Court applied due process analysis to find significant interference with the right to marry in *Zablocki*, it did not apply due process in *Califano*, where LeFrancois argues the statute at issue “clearly impinges on the right to marry.”³³⁰ He finds that the Court, rather than applying a pure substantive due process analysis, has instead invented a new standard, whereby “strict scrutiny will apply [to marriage], but only when triggered by certain facts: those that constitute significant interference.”³³¹ This, LeFrancois argues, does not truly support the classification of the right to marriage neatly within the existing fundamental due process framework, but instead more closely relates to an equal protection analysis, or a test for marriage unique in itself.³³²

Pull similarly contends that the right to marry is not as firmly defined as the Court’s language would suggest, stating that “[t]he notion of a fundamental right implies a firm entitlement that the state cannot deny, define, or disrespect, but marriage boundaries in the United States have always been subject to near plenary state definition and control.”³³³ He, similarly to LeFrancois, presents that the right to marry falls more neatly under equal protection analysis, rather than a substantive

³²⁶ P Cain, ‘Imagine There’s No Marriage’ (1996) 16 QLR 27 at 33. Note however, this article was written prior to the decision in *Obergefell v. Hodges*.

³²⁷ V Mayer-Schonberger, ‘Substantive due process and Equal Protection in the Fundamental Rights Realm’ (1990) 33 Howard Law Journal 287 at 295.

³²⁸ J Nowak, R Rotunda and J Young, *Principles of Constitutional Law* (3rd edn, West 1986).

³²⁹ A LeFrancois, ‘The Constitution and the Right to Marry: A Jurisprudential Analysis’ (1980) 5 Oklahoma City University Law Review 507 at 525.

³³⁰ *ibid* at 529.

³³¹ *ibid* at 527.

³³² *ibid* at 525.

³³³ J Pull, ‘Questioning the Fundamental Right to Marry’ (2006) 90 Marquette Law Review 21.

due process right.³³⁴ He argues that a central obstacle to determining the scope of the right is the difficulty in defining “marriage” itself, as marriage encompasses a wide range of legal and social dimensions. He finds that the Court has largely defined marriage as a legal institution, but that “[t]o make a fundamental right to legal-marry matter, one must posit that there is a core meaning to ‘marry’ that the state cannot alter. Yet, there is no core meaning of marriage that can be justified in our constitutional scheme.”³³⁵

Sunstein attempts to answer this question of what the fundamental right to marry, if it exists, exactly entails.³³⁶ He arrives at the conclusion that the right would include “access to whatever expressive and material benefits the state now provides for the institution of marriage.”³³⁷ Like Pull and LeFrancois, Sunstein argues that the right to marriage, even if considered fundamental, should be analyzed through an equal protection, rather than due process, lens whereby the Court would be tasked with determining the infringement of the right based on the social group of the infringed-upon party, rather than a blanket substantive rights standard.³³⁸ He likens this standard as similar to the Court’s approach to laws infringing on the right to vote.³³⁹ He finds that while “the right to marry counts as fundamental, for equal protection purposes, because of the expressive benefits that come from official, state-licensed marriage”, it does not fit so neatly under the substantive due process framework.³⁴⁰

The categorization of marriage as a right under equal protection analysis is further supported by Tebbe and Widiss, who argue that the right to marriage is one of “equal access.”³⁴¹ They argue that while the existing cases on the right to marry have a common thread of justification, they in fact “do not share a consistent doctrinal basis.”³⁴² Instead, they present an “equal access approach...that, once conferred, the right to marry in a legally recognized ceremony is

³³⁴ *ibid* at 80.

³³⁵ *ibid* at 66 and 81.

³³⁶ C Sunstein, ‘The Right to Marry’ (2004) 76 University of Chicago Public Law & Legal Theory Working Paper.

³³⁷ *ibid* at 5.

³³⁸ *ibid*.

³³⁹ *ibid*.

³⁴⁰ *ibid* at 20.

³⁴¹ N Tebbe and D Widiss, ‘Equal Access and the Right to Marry’ (2010) 158 University of Pennsylvania Law Review 1375.

³⁴² *ibid* 1390.

fundamental: if a government decides to recognize and support civil marriage, it cannot exclude same-sex couples without providing adequate justification.”³⁴³

Matsumura further complicates the question of an existing fundamental right to marry by suggesting that if the right to marry exists, it must also entail a reciprocal right *not* to marry.³⁴⁴ He notes that in the wake of *Obergefell*, many states automatically converted civil unions to marriages, despite the wishes of the individual couple.³⁴⁵ While perhaps well-intentioned by states wishing to recognize the validity of relationships of same-sex couples, Matsumura argues that these blanket conversions in fact constitute a compulsion of marriage, which can fall on a “spectrum from minimal interventions, like creating legal incentives for people to marry (for example providing favorable inheritance tax, evidence, and tort rules to married couples) to maximal ones (like requiring marriage between unwilling participants).”³⁴⁶ For Matsumura, if the State’s interference in one’s right to marriage is indeed an infringement on a fundamental right, no such compulsion could pass substantive due process analysis. This would correspond with the language in *Zablocki*, where the Court concluded that only “reasonable regulations that do not significantly interfere with the decision to enter into the marital relationship” would be upheld.³⁴⁷ Yet, it is clear from the Court’s reasoning in that decision that they intended only to apply the right to government regulations that discouraged marriage, rather than those that might encourage or compel marriage.³⁴⁸ Indeed, as evidenced in Chapter 1.3, state-led programs, such as the “Bridefare” program, created significant incentives for marriage without constitutional challenge.

Conclusions

As evidenced by the above discussion, the existence of a fundamental right to marry and its parameters is hotly debated, but let us presume that it is in fact a fundamental substantive due process right. What test then should we apply to determine if capacity restrictions on marriage would be deemed constitutional? As stated above, fundamental rights have typically received strict scrutiny analysis; however no marital case in front of the Court has been decided under the

³⁴³ *ibid* at 1377. Note that this article was published prior to the passing of *Obergefell v. Hodges*, which guaranteed the right to marry to same-sex couples.

³⁴⁴ K Matsumura, ‘A Right Not to Marry’ (2016) 84 Fordham Law Review 1509.

³⁴⁵ *ibid*.

³⁴⁶ *ibid*.

³⁴⁷ *Zablocki v. Redhail* (n 312); *Califano v. Jobst* (n 310).

³⁴⁸ *See Zablocki v. Redhail* (n 312).

traditional strict scrutiny standard. While the court in *Obergefell* emphasized the right to marry as a fundamental due process right, it did not actually describe the level of scrutiny applied in the case.³⁴⁹ We therefore have two potential tests that can be applied to a challenge under the fundamental right to marry. The first is the standard strict scrutiny test, which should hypothetically be applied to all cases where the law infringes on a fundamental due process right. The second is the test from *Zablocki*, which remains the only definitive standard that the Court has outlined in testing a law against the so-called fundamental right to marry.

Beyond the standard that should be applied by courts to cases of marriage, this thesis adds to this discourse an even more fundamental definitional challenge: whether the Court envisions a right “to marry” or a right “to marriage”. These terms are used interchangeably by the Court, as well as largely by Constitutional scholars, as discussed above. However, these terms are not in fact interchangeable. The right “to marry” would seemingly target laws that create barriers to the actual act of marrying, that is the entry into the legal contract of marriage. This seems to be the Court’s primary concern in cases such as *Loving*, *Califano*, *Zablocki*, and *Obergefell*. Each of these decisions dealt with barriers to parties seeking to enter a marriage. *Loving*³⁵⁰ and *Obergefell*,³⁵¹ both arguably more rooted in equal protection analysis than substantive due process, looked specifically at the restrictions on contracting of marriage between certain couples (mixed race and same-sex respectively). In *Califano*³⁵² and *Zablocki*,³⁵³ the Court looked to the procedural restrictions on entering the contract of marriage in assessing the boundaries of the right. The right “to marry” in these cases stands apart from other rights and is to be viewed as applying only at the point of entry into the marriage contract. Thought of in this way, the “right to marry” fits more neatly under the “right to contract” as discussed above than as a stand-alone right unto itself. While previously applied only to economic contracts, the right to contract is predicated on a liberty interest in entering and executing contracts without undue government interference. The right to marry could be construed in such a manner, as the above cases

³⁴⁹ *Obergefell v. Hodges* (n 1); see also M Stearns, ‘Obergefell, Fisher, and the Inversion of the Tiers’ 19 Journal of Constitutional Law 1043.

³⁵⁰ *Loving v. Virginia* (n 306).

³⁵¹ *Obergefell v. Hodges* (n 1).

³⁵² *Califano v. Jobst* (n 310).

³⁵³ *Zablocki v. Redhail* (n 312).

illustrate how the Court has struck down provisions that it deems as unduly restricting the ability of parties to freely contract to marriage.

However, the “right to marriage” would seem to be far broader than the mere “right to marry”, encompassing certain rights within the marriage itself. Cases such as *Griswold*,³⁵⁴ *Skinner*,³⁵⁵ and *Cleveland Board of Education*³⁵⁶ are seen as forming the foundation of the fundamental right but discuss not the ability of an individual to enter a marriage, but the right as applying within the marriage itself, largely to issues related to procreation and sexual relations. Indeed, *Griswold* and *Skinner* are seen as seminal cases establishing the “right to privacy.”³⁵⁷ These cases cannot be seen as supporting a mere right “to marry”, that is to enter a marriage contract, but rather as creating a zone of privacy around the marital relationship. From this view, the state is limited in its ability to interfere with the ongoing marital relation, not just the ability to marry. Such justification does correspond to certain protections of spousal relations in other areas of the law; for instance, under the Federal Rules of Evidence, communication between spouses is privileged and spouses cannot be compelled to testify against each other.³⁵⁸

A “right to marriage” founded in the right to privacy could also provide justification for the marital rape exceptions that still exist for children and persons with mental disabilities as discussed in the previous chapters.³⁵⁹ While the State may ordinarily play a protective role for minors and persons with mental disabilities by criminalizing sexual relations with these individuals, once the parties are married, they enter into a zone of privacy that cannot be as easily regulated. Such reasoning was once used to justify the existence of general marital rape exceptions, but all states have now eliminated their exceptions for married couples in the case of forcible rape.³⁶⁰ Nevertheless, a “right to marriage” seems to fall under the umbrella of privacy, and the ramifications of this positioning could significantly separate such a right from the narrowly construed “right to marry.” For clarity, this thesis will from this point on refer to the

³⁵⁴ *Griswold v. Connecticut* (n 289).

³⁵⁵ *Skinner v. Oklahoma* (n 291).

³⁵⁶ *Cleveland Board of Education v. Loudermill* (n 262).

³⁵⁷ See eg. Mayer-Schonberger (n 327).

³⁵⁸ Federal Rules of Evidence, Rule 501

³⁵⁹ Chapters 2.1 and 2.2.

³⁶⁰ See generally National Domestic Violence Hotline, ‘Marital Rape and Domestic Violence’ <<https://www.thehotline.org/resources/marital-rape-and-domestic-violence/>> accessed 10 February 2025.

fundamental right “to marry”, as this is the most commonly used terminology. However, it is arguably an open definitional issue.

1.5 Theories of Consent³⁶¹

As discussed in Chapter 1.2, while there is no single unified definition of forced marriage across the US, most definitions incorporate the language of “full and free consent.” Yet, as demonstrated in Chapter 1.3, lawmakers and judges alike have struggled over the question of “free consent” and marriage throughout US history. Accordingly, we take a step back to ask some fundamental questions: what is consent? What is necessary to give valid consent? What makes consent authentic? While these would seem to be basic inquiries, there is shockingly little discourse on these issues in the field of marital law. We must therefore turn to theories of consent more broadly in an attempt to answer these questions.

Consent, in its most basic conceptualization, is the expression of a person’s freedom.³⁶² In his work on the concept of personhood, Frankfurt describes the “freedom of action” as the freedom to do what one wants to do, while the “freedom of will” is the freedom to want what one wants to want.³⁶³ This distinction, while subtle, is critical in separating the outward performance of consent from the mental processes and emotional boundaries that affect the ability to ‘want what we want.’ As we will see, most of the discourse on consent is aimed at reconciling the physical manifestations of consent with the internal processes of the givers of consent.

The focus on individual consent, while integral to the current understandings of ethics and legal theory, is surprisingly new in its popularity. According to Daniel Johnston, “In the earliest writings in the Western tradition, consent plays a limited role in shaping relations among individual persons, and when it does play a role it is often cast in a negative light.”³⁶⁴ In a societal model that emphasizes the collective, rather than the individual, as was the case for much of early Western history, the consent of individuals to actions was of far less importance than the will of the community. However, the burgeoning of democracy and a growing emphasis on individualism throughout the last several centuries has shifted the discussion of choice-ethics from one of collective decision-making to one more focused on the autonomy of the person. In modern discourse, consent has become the central theory to understanding why and how

³⁶¹ Published in the Leicester Student Law Review, *Law in Times of Change: Global Trends in Justice* (2024 – 2025).

³⁶² See generally HM Hurd, ‘The Moral Magic of Consent’ (1996) 2 Legal Theory 121 at 125 (“It must be the case that to consent is to exercise free will.”)

³⁶³ HG Frankfurt, ‘Freedom of the Will and the Concept of a Person’ 127.

³⁶⁴ D Johnston, ‘A History of Consent in Western Thought’ in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 35.

individuals make decisions, and the legitimacy of those decisions. As summarized by Miller and Wertheimer, consent and consent transactions serve the twin values of prioritizing the well-being and interests of consent-givers and maximizing the autonomy and self-determination of individuals.³⁶⁵

While this thesis will not attempt to provide a complete analysis of consent theory, it presents a preliminary differentiation between the major theories of consent. First, it examines broad ethical theories on permissive vs. originating consent, as well as how the authenticity of consent should be evaluated. It then narrows this inquiry to the theories of consent in contracts, which is relevant to the later analysis of consent to contract to marry.

Consent in Ethics

The first and most predominant theory of consent in ethics is the concept of “permissive consent.” Permissive consent is broadly understood as consent that serves as a waiver to an act that would otherwise be forbidden.³⁶⁶ This understanding of consent is rooted in the ancient legal maxim of *volenti non fit injuris*, or ‘to a willing person, it is not a wrong.’³⁶⁷ Under this theory, a person who knowingly and voluntarily assents to an action cannot then claim injury or moral repugnance at the result of the action. This form of consent “transforms an impermissible act into a permissible one.”³⁶⁸

Permissive consent lines up with the “Gate Opener” model, as supported by Richard Healey and John Kleinig, whereby consent’s main function is to “serve the power-holder’s interest in having control over whether other people can act in certain ways.”³⁶⁹ The “lock-and-key” model described by Miller and Wertheimer also describes a permissive consent theory, whereby consent provides the “key” to unlock the moral permissiveness of an action.³⁷⁰ Whether described as a gate opening or unlocking key, permissive consent assumes the existence of an action by one

³⁶⁵ See FG Miller and A Wertheimer, ‘Preface to a Theory of Contract Transactions: Beyond Valid Consent’ in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 83.

³⁶⁶ See eg. NC Manson, ‘Permissive Consent: A Robust Reason-Changing Account’ (2016) 173 *Philosophical Studies* 3317 at 3318; see also T O’Shea, ‘Consent in History, Theory, and Practice’ [2011] *Essex Autonomy Project* at 2.

³⁶⁷ See generally P Schaber, ‘The Volenti Maxim’ (2020) 24 *Journal of Ethics* 79.

³⁶⁸ See P Schaber, ‘How Permissive Consent Works’ (2020) 33 *Wiley* 117 at 118.

³⁶⁹ See R Healey, ‘Consent, Interaction, and the Value of Shared Understanding’ (2022) 28 *Legal Theory* 35 at 36; J Kleinig, ‘The Nature of Consent’ in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 4 (“Consent can sometimes function like a proprietary gate that opens to allow another’s access, access that would be impermissible absent the act of voluntarily opening the gate.”)

³⁷⁰ Miller and Wertheimer (n 365) at 80.

party towards another, and deals specifically with the normative nature of that action based on the exchange of consent.

Permissive consent is the cornerstone of current understandings of sexual and medical ethics, where the “wrongness” or “rightness” of an action is defined by the consent of the parties. Permissive consent can also change the legal character of an action; for example, sexual penetration without consent can be charged as rape, and consent is a defense to that charge. However, permissive consent is to be understood as a more all-encompassing moral principle than a tool for legal standards (for example sexual penetration without permissive consent would constitute both a crime as well as, more broadly, a moral wrong.) This theory proposes that consent can in fact change the normative, wrong-making property of an action beyond simply changing its legal status, a difference that Beauchamp delineates as consent that serves to either provide “legal consent” or consent that “autonomously authorizes” some behavior in a way that changes its moral character.³⁷¹

While permissive consent is the most widely-discussed theory in consent ethics, it does not neatly apply to all situations where consent is exchanged. Where permissive consent may morally *allow* an exchange between parties, there is another form of consent that creates an exchange that could not exist without the mutual giving of consent. Schaber distinguishes between permissive consent and this separate form of consent that is “used in the sense of agreeing to do something.”³⁷² Manson broadly refers to this idea as “consent as agreement”³⁷³ and O’Shea more concretely names it “originating consent.”³⁷⁴ Originating consent involves “introducing, altering and endorsing certain actions.”³⁷⁵

This model is in line with Healey’s “Relational model” where consent creates a mode of interaction between the parties. The Relational model “aims to make vivid the significance of how this control is realized—through the giving and receiving of consent.”³⁷⁶ Healey’s theory corresponds to an understanding of autonomy rooted in the relationship between parties:

³⁷¹ T Beauchamp, ‘Autonomy and Consent’ in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010); *see generally* Schaber (n 368) at 122-123.

³⁷² Schaber (n 368) at 118.

³⁷³ NC Manson, ‘Permissive Consent: A Robust Reason-Changing Account’ (2016) 173 *Philosophical Studies* 3317 at 3319.

³⁷⁴ *See* T O’Shea, ‘Consent in History, Theory, and Practice’ [2011] Essex Autonomy Project.

³⁷⁵ *ibid* at 2.

³⁷⁶ Healey (n 369) at 37.

relational autonomy. Relational autonomy targets the complex influence of relationships on decision-making processes.³⁷⁷ Herring explains that relational autonomy is an understanding that autonomy does not mean being isolated or free of social responsibilities, but instead to be in a network of relationships and responsibilities.³⁷⁸ Thompson argues that relational autonomy is a particularly useful framework in which to understand consent in family relations, where she posits “it would be fair to ask if individuals ever make completely voluntary rational choices.”³⁷⁹ The relational model will be discussed in greater detail in the next section on Consent in Contracts.

With this understanding of permissive/Gate Opener v. originating/relational consent, how then do we determine when consent has been given? Several models propose how to make this determination. The mentalism view proscribes that an appropriate mental act is necessary and sufficient to create normative change in the character of an action.³⁸⁰ Thereby the consent-giver, through a change in their mental state, permits an action, which is then made morally permissible. Manson elaborates on the mentalism view by describing the “completeness thesis”, where a change in normative status “distinctive of consent— rendering another’s actions morally permissible—is completed by an act within the consenter’s mind.”³⁸¹ With its focus on the mindset of the consent-giver, the mentalism view does not accept that every outward expression of acquiescence expresses legitimate consent. This is a useful model, especially in situations where the consent-giver makes an expression of consent that is delegitimized by some sort of coercion that has affected her mental state. An obvious drawback of the model is that no one outside of the consent-giver herself can ever truly understand her mindset entirely at the time of consent.

An alternative to mentalism is the performative view, where the normative condition of an action is primarily changed through the consent-giver’s outward expression of consent.³⁸² Manson identifies this view as a more “robust” interpretation of consent, whereby the will of the consent-giver is manifested through their instruction, such as in the giving of commands or direct

³⁷⁷ S Thompson, ‘Feminist Relational Contract Theory: A New Model for Family Property Agreements’ (2018) 45 *Journal of Law and Society* at 11.

³⁷⁸ See J Herring, ‘Relational Autonomy and Family Law’ in J Wallbank, S Choudhry and J Herring, *Rights Gender and Family Law* (Routledge-Cavendish 2010); Thompson (n 377).

³⁷⁹ Thompson (n 377) at 11.

³⁸⁰ See Hurd (n 362); see also L Alexander, ‘The Moral Magic of Consent (II)’ (1996) 2 *Legal Theory* 165.

³⁸¹ Manson (n 373) at 3323.

³⁸² *ibid* at 3325.

requests.³⁸³ O'Shea similarly describes consent as an "illocutionary act", requiring a communicative action to accomplish the goal of expressing the will of the consent-giver.³⁸⁴ Kleinig and Dougherty likewise support a performative view of consent, and find that consent requires an act of communication.³⁸⁵ This view certainly makes the work of determining the giving of consent more straightforward, as we focus the assessment on the outward actions of the consent-giver. However, it runs the risk of dismissing a range of mental factors that can affect the outward performance of consent. As Hurd argues, "to equate consent only to observable acts leads to morally unacceptable results."³⁸⁶ Miller and Wertheimer expand on the performative view of consent with their "fair transaction model", which proscribes that a consent-receiver can morally proceed with an action if she has treated the consent-giver fairly and responded in a reasonable manner to the consent-giver's "token or expression of consent."³⁸⁷ In ascertaining this expression of consent, they recommend a "behavioral view", whereby consent is assumed by a communicative act.³⁸⁸

Taking a step further, beyond simply determining if consent is given, how can we determine if that consent is authentic? Beauchamp discusses the need for authentic consent to arise from autonomous persons through autonomous action.³⁸⁹ An autonomous person is one that has the capacity, as well as the liberty and agency, to consent to actions independently.³⁹⁰ Beauchamp contends that autonomous action requires "normal choosers who act 1) intentionally 2) with understanding, and 3) without controlling influence."³⁹¹

O'Shea, similarly, finds that decisions are authentic if they "spring from authentic motivations, which are motivations properly integrated into our psyche in a way in which we are not alienated from them."³⁹² In determining these motivations, O'Shea argues for a holistic evaluation of the

³⁸³ *ibid* at 3325-3330.

³⁸⁴ O'Shea (n 374) at 30.

³⁸⁵ See J Kleinig, 'The Nature of Consent' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 5 ("I argue for a view that consent is centrally and most appropriately a communicative act"); T Dougherty, 'Yes Means Yes: Consent as Communication' (2015) 43 *Philosophy & Public Affairs* 224 at 229.

³⁸⁶ Hurd (n 362) at 136.

³⁸⁷ Miller and Wertheimer (n 365) at 81.

³⁸⁸ *ibid* at 84.

³⁸⁹ See Beauchamp (n 371) at 61.

³⁹⁰ *ibid* (defining liberty as "the sense of independence from controlling influences" and agency as a "sense of intentional action"); see also Part II.

³⁹¹ *ibid* at 65; see also Part III.

³⁹² O'Shea (n 374) at 30.

mental state of the consent-giver, including outside influences on her decision-making. In particular, he points out the effect that can be made by third parties in influencing the mental processes of the consent-giver. He emphasizes that the “context and relationship of the parties is essential” in determining if the influence of an outside party overrides the mental state of the consent-giver, so as to invalidate her consent.³⁹³ This influence of outside factors will be discussed in greater detail in the later discussion of Consent to Contract.

O’Shea’s holistic model of authenticity assessment corresponds to a mentalism view supported by Hurd and Alexander, where one must enter into the mind of the consent-giver in order to determine the authenticity of consent.³⁹⁴ Hurd argues that in order for consent to be legitimate, there must be a correlation between the mental state of the consent-giver and the actual actions of the consent-receiver, stating that “consent to another’s act is to desire that he perform it.”³⁹⁵ Alexander expands on this argument of the relationship between mental desire and performed act, and argues that this disconnect may constitute a “false belief” that invalidates consent.³⁹⁶ From this view, consent may indeed be given for *an* action, but it is not authentic if in reality it is not *the* action that was desired by the consent-giver. In this way, authenticity cannot simply be determined at the moment that consent is given but must be evaluated throughout the parties’ exchange.

The theories outlined above are instructive, but ultimately rooted in ethics, which informs, but is of course not synonymous with, legality. Indeed, much of the foregoing theories have been most frequently applied to the issue of “informed consent” in bioethics, which creates a useful, but imperfect, example of consent that we might apply to marriage. As Miller and Wertheimer note, the emphasis on the morally transformative impact of informed consent is quite unique to the world of medical ethics.³⁹⁷ We therefore turn to a more direct application of consent theory by looking at the theories of Consent to Contract. It is critical to note that marriage stands apart from general contract law in many important ways, most obviously that contracts are traditionally private agreements where the parties can negotiate their own terms. In contrast, marriage involves not only private parties (the spouses), but the public party of the State, which provides

³⁹³ *ibid* at 28.

³⁹⁴ *See* Hurd (n 362) at 125.

³⁹⁵ *ibid* at 126.

³⁹⁶ at 167-168.

³⁹⁷ *See* Miller and Wertheimer (n 365) at 80.

the unchangeable terms of the marriage contract to which the parties are bound. Any theories related to the freedom to contract must be tempered in the application of these concepts to marital law, as in reality the parties to a marriage are not free to negotiate their own terms.³⁹⁸ Even with this distinction, an examination of the theories of consent to contract is instructive in the attempt to uncover the broader meaning of consent in marriage.

Consent in Contract

The consent theory of contracts, pioneered by Barnett, has become a cornerstone of the understanding of contractual law. This theory defines consent as the “moral prerequisite to contractual obligation.”³⁹⁹ Barnett argues that contract enforcement is justified because the consent-giver has performed acts conveying the intention to create an “enforceable obligation by transferring alienable rights.”⁴⁰⁰ He contrasts this theory to will theory, which emphasizes the will of the parties in creating the contractual relationship, and contends that consent theory is a superior model, as it is “able to account for the normal objective-subjective relationship in contract law.”⁴⁰¹ From this theory, Barnett argues for an objective view of contracts, where consent must be manifested in order to invoke the institution of contract.⁴⁰² This objective analysis aligns with the performative view of consent, where the giving of consent requires an act of communication. While Barnett does acknowledge that the subjective mental state of the consent-giver is important, he argues that objectively manifested conduct “usually reflects subjective intent”.⁴⁰³ He ultimately concludes that “only a general reliance on the objectively ascertainable assertive conduct” will create a stable basis for contractual obligation.⁴⁰⁴

From the objective perspective of his consent theory, Barnett discusses the role of “default rules”, which he argues create uniformity across contract law, and under consent theory are to be viewed in the same objective manner in which we view contracts themselves.⁴⁰⁵ By consenting to contract, parties are also consenting to be governed by the default contract rules, even if

³⁹⁸ Spouses are of course able negotiate prenuptial agreements that will apply in the event of the dissolution of their marriage. However, we are speaking here of the actual marriage contract, which unchangeable document with the terms specified by the State.

³⁹⁹ RE Barnett, ‘A Consent Theory of Contract’ (1986) 86 Columbia Law Review 269 at 297.

⁴⁰⁰ *ibid* at 300.

⁴⁰¹ *ibid*.

⁴⁰² *ibid* at 302 and 305.

⁴⁰³ *ibid* at 304.

⁴⁰⁴ *ibid* at 303.

⁴⁰⁵ *See generally* RE Barnett, ‘The Sound of Silence: Default Rules and Contractual Consent’ (1992) 78 Virginia Law Review 821.

subjectively they were not aware of these rules. In this way, Barnett argues that there is a potential for a court to infer the manifestation of consent from a party's silence stating, "Silence in the face of default rules can constitute an indirect consent to courts using these default rules when a gap exists in the parties' expressions of consent."⁴⁰⁶ Daniel Johnston likewise supports the imposition of default, or standardized, terms in contract relations as a way to guarantee efficiencies that "commonly result in increases in the extent to which social relations are based on individual consent."⁴⁰⁷

Barnett's consent theory, and accompanying views on the application of default rules, ideally create a clear understanding of the creation of enforceable contractual relationships. As with the broader ethical model of performative consent, the consent theory of contracts does not require us to delve into the mind of the consent-giver, but rather to assess their assent via outwardly manifested actions. It also presupposes that default consent rules are known, or at least are knowable, to the parties, so that application of these default rules is legally justifiable.⁴⁰⁸ The clarity and uniformity of Barnett's model has led to the consent theory becoming the most predominantly applied theory of contractual analysis by courts.⁴⁰⁹

However, despite its wide-spread acceptance, there are vocal detractors from the consent theory and its reliance on default rules. Opponents highlight the limitations of this objective model in assessing the validity of consent, particularly in the face of outward influences and power dynamics. Prevalent amongst these critics is Kalevitch, who advocates for a will theory of contracts over a consent-based model.⁴¹⁰ Kalevitch argues that will theory helps us to better examine the validity of a party's consent by looking at their actual assent to the contract, rather than just their outward manifestations of consent.⁴¹¹ He finds that Barnett's description of these manifestations is cryptic and does not get to the heart of the actual intent of the parties to be bound by a contract, which he argues must be done from a subjective evaluation.⁴¹² Similarly, Grossi counters the complicit acceptance of default terms, stating that in fact the understood purpose of contract is "as a means of liberating society by moving away from socially imposed

⁴⁰⁶ *ibid* at 856-866.

⁴⁰⁷ Johnston (n 364) at 42.

⁴⁰⁸ See L Kalevitch, 'Gaps in Contracts: A Critique of Consent Theory' (1993) 54 Montana Law Review at 191.

⁴⁰⁹ See *eg.* Alexander (n 380) at 71.

⁴¹⁰ See Kalevitch (n 408).

⁴¹¹ *ibid* at 183.

⁴¹² *ibid* at 200.

obligations (status) towards self-created ones.”⁴¹³ Bix likewise rejects the wholesale assumption that parties’ consent to the default terms of a contract if they are unknown at the time of signing, describing such a scenario in fact as “an absence of consent in the robust sense.”⁴¹⁴

Leonhard provides an alternative framework for how we might perform a subjective evaluation of contract with his “totality of the circumstances” test.⁴¹⁵ Leonhard expands on Kalevitch’s argument for a subjective view of consent to include not just the mental state of the consent-giver, but the influences manipulating that mental state.⁴¹⁶ He highlights the role of outside influences on the psyche of consent-givers, acknowledging the effect that obligations to family, friends, superiors, and various affiliated groups have on one’s subjective state⁴¹⁷, what Frankfurt might describe as the ability to “want what we want to want.”⁴¹⁸ Leonard argues that courts will inevitably “use coercive power of the state to favor the more powerful party in an economic relationship”⁴¹⁹ and that courts’ current focus on consent theory will “often result in enforcing an agreement where there is no consent.”⁴²⁰ To combat this, he proposes that we look at the totality of the circumstances surrounding an individual’s consent to assess their subjective position, as well as the conditions that influenced that consent to determine if those factors could potentially override the free will of the consent-giver.⁴²¹ Grossi likewise asserts that consent must be understood contextually, as an objective evaluation “obscures the exercise of power.”⁴²² She argues that consent alone cannot answer the pivotal questions of who can legitimately consent and under what circumstances, so we must instead take into account a broad range of facts and circumstances that affect both individuals and societal roles generally.⁴²³

In order to appropriately evaluate the totality of circumstances surrounding the consent to contract, we must begin to acknowledge the various relationships that influence one’s sense of autonomy. Traditional notions of autonomy have prioritized the individual, where we assume that

⁴¹³ R Grossi, ‘What Can Contract Law Learn from #MeToo?’ (2022) 49 *Journal of Law and Society* 263 at 274.

⁴¹⁴ B Bix, ‘Contracts’ in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 251.

⁴¹⁵ C Leonhard, ‘The Unbearable Lightness of Consent in Contract Law’ (2012) 63 *Case Western Law Review* 57.

⁴¹⁶ *ibid* at 62.

⁴¹⁷ *ibid* at 65.

⁴¹⁸ HG Frankfurt, ‘Freedom of the Will and the Concept of a Person’ 127 at 15.

⁴¹⁹ Leonhard (n 415) at 62.

⁴²⁰ *ibid* at 79.

⁴²¹ *ibid* at 85-89.

⁴²² Grossi (n 413) at 275.

⁴²³ *See ibid*.

private actors make private decisions to maximize their own well-being.⁴²⁴ This model can be useful in evaluating exchanges where no relationship exists between the parties beyond the “simple exchange of goods”⁴²⁵ but seems fundamentally unable to encapsulate the complicated social and interpersonal factors that influence decisions more broadly. Feminist scholars, in particular, have emphasized the need to reject an “each man is an island” mentality and instead prioritize the interdependence of actors.⁴²⁶ In the words of Johnson, the cultural insistence that we as individuals are separate and autonomous is patriarchy’s “Great Lie.”⁴²⁷

To better understand how relationships influence consent to enter agreements, we look to “relational contract theory”, developed by MacNeil, which recommends that we evaluate first the relationships of the parties to a contract before looking at the transaction itself.⁴²⁸ MacNeil identifies several criteria that hallmark relational contracts including: “commencement, duration, and termination; measurement and specificity; planning; sharing versus dividing benefits and burdens; interdependence, future co-operation, and solidarity; personal relations among, and numbers of, participants; and power.”⁴²⁹ The theory is neatly summarized by Eisenberg, who states that relational contract involves “not merely an exchange, but also a relationship, between the parties.”⁴³⁰ Relational contract theory requires a broad assessment of personal, economic, and social influences on the parties of a contract. As argued by Chen-Wishart, under a relational contract approach:

Courts should consider factors such as the behavior and responsibility of the contract parties at the time of formation, and the overall need to protect them against harsh and unfair outcomes. Courts need to move away from the consent and towards a multidimensional examination with specific regard to the nature of the relationship itself.⁴³¹

⁴²⁴ See eg. Barnett (n 399).

⁴²⁵ IR Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press 1980) at 10.

⁴²⁶ Herring (n 378).

⁴²⁷ A Johnson, *Gender Knot* (Temple University Press 1997) at 30.

⁴²⁸ IR Macneil, *Contracts: Exchange Transactions and Relations, Cases and Materials* (2001).

⁴²⁹ IR Macneil, ‘Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a ‘Rich Classificatory Apparatus’ (1981) 75 *Northwestern University Law Review* 1018 at 1025.

⁴³⁰ MA Eisenberg, ‘Relational Contracts’ in J Beatson and D Friedmann, *Good Faith and Fault in Contract Law* (Clarendon Press 1995) at 296.

⁴³¹ See M Chen-Wishart, ‘The Nature of Vitiating Factors in Contract Law’ in G Klass, G Letsas and P Saprà (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014).

Gan likewise supports an understanding of contracts through a relational lens, specifically power dynamics between parties that fundamentally shape the giving of consent.⁴³² According to Macneil, relational contract theory is particularly useful in dealing with “presentation”, where a long-term contract deals with the future as if it were the present.⁴³³ Unlike economic agreements where performance can be measured concretely and immediately, presentation agreements require a far-sighted view of contracts, where the relationship between the parties will inevitably change and evolve through the exchange, and Macneil contends that relational contract theory provides a useful framework for evaluating such contracts.⁴³⁴ Lecky applies this thinking to the contract of marriage:

The letter of [the marriage contract’s] obligations and exchanges cannot be set out completely at the beginning, or at least it is inefficient to attempt to do so, and the commitments made initially do not, except in a vague, hortatory way, exhaust everything the parties expect to occur within the relationship.⁴³⁵

Unlike a short-lived contract for an exchange of goods, marital contracts are by their nature intended to last ‘until death do they part’, making it perhaps the most extreme example of presentation, whereby parties enter into one agreement that shall dictate their behavior to a set standard for life.

Sharon Thompson has expanded on relational contract theory to include an explicitly feminist lens of contract interpretation, which she calls “Feminist Relational Contract Theory” (FRCT).⁴³⁶ FRCT patently rejects a gender-neutral view of contracts and argues for the recognition of the unequal and gendered structures of society when interpreting the validity of a contract. Thompson applies her theory to the concept of nuptial agreements in heteronormative marriages, where she argues that women often have significantly less socioeconomic standing, and therefore

⁴³² O Gan, ‘Contractual Duress and Relations of Power’ (2013) 36 Harvard Journal of Law and Gender 172.

⁴³³ Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (n 425); see also, S Thompson, ‘Feminist Relational Contract Theory: A New Model for Family Property Agreements’ (2018) 45 Journal of Law and Society; IR Macneil, *Contracts: Exchange Transactions and Relations, Cases and Materials* (2001).

⁴³⁴ See generally Macneil, *Contracts: Exchange Transactions and Relations, Cases and Materials* (n 428).

⁴³⁵ R Lecky, ‘Relational Contract and Other Models of Marriage’ (2002) 40 Osgoode Hall Law Journal 1 at 8.

⁴³⁶ Thompson (n 377).

bargaining power, in the relationship.⁴³⁷ From her perspective, FRCT presents a new understanding of the consent of parties to contract which “does not view choice as simply saying ‘yes’ or ‘no’ to bad agreements and argues instead that it is possible to follow a third route: negotiation that is beneficial for both parties.”⁴³⁸

Thompson proposes that in order to apply FRCT, courts must take a more expansive view of undue influences on parties when evaluating contractual agreements. She suggests that courts distinguish between “normal and abnormal pressure according to the experiences of individual couples.”⁴³⁹ FRCT represents the opposite end of the spectrum from the objective lens of consent theory, and instead argues that courts should take into account a wealth of subjective information about the relationship between the parties, outside influences, and social factors (namely patriarchy) when evaluating contracts. This theory is supported by Grossi, who argues that “objectivity is a mask for power and that aspects of our identity and social context influence our legal decision making and impact upon the ways in which we interpret legal facts and principles.”⁴⁴⁰ Compelled by this reasoning, Grossi argues for the application of a broader understanding of contextual factors in consent transactions, from sexual relations to contract negotiations.⁴⁴¹

Relational contract theory, as the name suggests, is particularly suited to “relational contracts” such as marriage, which Cohen describes as a “relational contract that could appreciate a range of investments specific to the intimate relationship.”⁴⁴² Lecky supports the view of marriage as a relational contract to be evaluated by relational contract theory, as marriage is an agreement that expands beyond economic interests to encompass “non-economic and emotional support”.⁴⁴³ He goes on to contend that the relational contract model better accounts for the incremental changes in obligations between parties that occur throughout a marriage.⁴⁴⁴

⁴³⁷ *See generally* *ibid.*

⁴³⁸ *ibid* at 22.

⁴³⁹ *ibid* at 23.

⁴⁴⁰ Grossi (n 413) at 263.

⁴⁴¹ *See ibid.*

⁴⁴² L Cohen, ‘Marriage, Divorce, and Quasi Rents; or, “I Gave Him the Best Years of My Life”’ (1987) 16 *The Journal of Legal Studies* 267.

⁴⁴³ Leckey (n 435) at 8.

⁴⁴⁴ *ibid* at 18.

Paternalism and Consent

It is impossible to hypothesize a contextual theory of consent evaluation, such as the one proposed by FRCT, without considering the paternalism ramifications of such a subjective model. When we determine that an outward assertion of consent is illegitimate, however well-intentioned this determination may be, we do exercise some level of paternalism over the consent-giver by disregarding her token of consent. The right of individuals to consent to actions on their own behalf has long been upheld as a cornerstone of autonomy, regardless of whether the action in fact leads the individual to be in an objectively worse position. As Miller and Wertheimer state, “It is commonly thought that we have reason to respect a person’s decision or acknowledge her right to autonomy, even when doing so does not maximize her well-being. Being regarded as an autonomous person is integral to one’s self-respect.”⁴⁴⁵ Johnston likewise emphasizes that the commonly held view of consent transactions is that “if people voluntarily consent to a transaction, then that transaction must be mutually advantageous.”⁴⁴⁶

Yet, even when we seek to uphold a robust model of personal autonomy to consent, there are a myriad of situations where this consent must be disregarded in the interest of justice and the well-being of the individual. In cases where consent was clearly obtained via duress or fraud for example, it seems the only just solution is to dismiss that consent in its entirety. However, the work of determining what behavior rises to the level of duress or fraud is often a difficult one, and a challenge that will be discussed at length in Part III of this thesis. In addition, in what conditions do coercion, inducement, or persuasion cause us to dismiss an individual’s consent as invalid? Alexander ponders this question in his discussion of threats vs. strong offers: while a direct threat would automatically seem to override the legitimacy of consent (for example, “do this or I’ll kill you”), he queries whether strong offers likewise invalidate consent (such as “do this and I will cure your illness”).⁴⁴⁷ Alexander leaves this question of negative vs. positive inducements open, and it is evaluated in the context of marital consent in Chapter 3.1.⁴⁴⁸

Whether we seek to devalue consent based on force or fraud, we have seen from the previous discussion of subjective consent analysis that we cannot make these evaluations in a vacuum.

⁴⁴⁵ Miller and Wertheimer (n 365) at 83.

⁴⁴⁶ D Johnston, ‘A History of Consent in Western Thought’ in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 50.

⁴⁴⁷ Alexander (n 380) at 170.

⁴⁴⁸ Chapter 3.1

What constitutes an outside force sufficient to invalidate the consent of a giver will likely depend on a variety of personal, relational, and socioeconomic factors such as gender, race, religion, etc. The more external factors we consider in the decision to honor or devalue an individual's outward expressions of consent, the further we move from a pure acceptance of the giver's consent and the more paternalistic the evaluation becomes.

Beyond the decision to override an individual's consent due to influencing factors, we may also paternalistically determine that people cannot give valid consent to actions that will cause them serious harm. While the general theory of permissive consent allows for actors to make decisions against their best interest, the law does proscribe limits to the ability to commit actions against one's physical body, such as in the prohibition of voluntary euthanasia.⁴⁴⁹ Tadros contends that in such instances, we have implicit "self-regarding duties", those duties towards our personhood that have their own moral significance and to which no exercise of permissive consent is valid to allow others to violate.⁴⁵⁰ In such instances, the law plays a paternalistic role in invalidating consent, regardless of the autonomy and capacity of the decision-maker.

While it is no doubt paternalistic to devalue the communicative actions of a consent-giver, that paternalism is not inherently wrong, and is indeed often necessary in the interest of justice. According to Husak, paternalism is reasonable when it is justified⁴⁵¹ and when a party acts with justified paternalism, the consent of the other party is in fact irrelevant.⁴⁵² These justifiable actions of paternalism are often enshrined in law through "libertarian paternalism", where default societal rules are designed to correct for cognitive biases and minimize the likelihood that people will make decisions that are contrary to their own interests.⁴⁵³ An example of such a rule in marital law is the requirement of a waiting period before spouses can file for divorce, which is justified by the State as protecting parties from "rushing" into a separation when the relationship could still potentially be mended. This thesis queries the application of such libertarian

⁴⁴⁹ See V Tadros, 'Consent to Harm' in V Tadros, *Wrongs and Crimes* (Oxford University Press 2016).

⁴⁵⁰ *ibid.*

⁴⁵¹ See D Husak, 'Paternalism and Consent' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 115.

⁴⁵² *ibid* at 111.

⁴⁵³ *ibid* at 112.

paternalism in marital law, particularly in its discussion of the withdrawal of consent to remain married in Chapter 3.3.⁴⁵⁴

Closely related to this discussion of paternalism is what this thesis broadly refers to as “substituted consent”. Substituted consent, when a third party consents to a transaction in place of the usual consent-giver, has most commonly been employed to the field of bioethics, whereby family members consent to medical treatment on behalf of unconscious patients.⁴⁵⁵ However, substitution of consent arises across a variety of situations where outside parties stand in as consent-givers for those who are deemed to lack the capacity to independently consent. The most obvious example of substituted consent is parents consenting for their children. Parents consent on behalf of their minor children for educational purposes, medical procedures, and indeed almost all decisions in their children’s early lives. This principle, codified in what are broadly known as “parental involvement laws”⁴⁵⁶, has gone largely unchallenged for young children who lack the understanding to make informed decisions as to their own health and safety. Substituted parental consent becomes more controversial, however, as children gain intellectual capacity but remain under the age of legal majority. For instance, issues such as the ability of minors to independently consent to medical treatment without their parents are hotly debated.⁴⁵⁷ Where parents throughout US legal history have traditionally been seen as the ultimate stalwarts of their children’s well-being, many now question how expansive the right of a parent to substitute the consent of her child should be. This is particularly prescient when the parent refuses to provide consent for actions to which the child has separately provided authorization, such as to an abortion⁴⁵⁸ or gender-affirming care.⁴⁵⁹

At first glance, the issue of children’s consenting to medical care seems to pit two actors against each other: the individual child and the individual parent. Whose consent should govern in these scenarios? This question is made more complicated when we include the notion of relational autonomy, as discussed in the previous section. As noted by Herring, the medical treatment of a child has not only an impact on the child herself but has natural repercussions in the lives of her

⁴⁵⁴ See Chapter 3.3.

⁴⁵⁵ See Kleinig (n 244) at 14.

⁴⁵⁶ A Kramer and others, ‘The Impact of Parental Involvement Laws on Minors Seeking Abortion Services: A Systematic Review’ (2023) 1 Health Affairs Scholar 4.

⁴⁵⁷ See generally Herring (n 378).

⁴⁵⁸ See *ibid.*

⁴⁵⁹ See *eg.* S Dubin and others, ‘Medically Assisted Gender Affirmation: When Children and Parents Disagree’ (2022) Journal of Medical Ethics.

parents and the rest of her family.⁴⁶⁰ When children remain the legal dependents of their parents, how do we honor their individual autonomy while still understanding that their decisions are impacted greatly by the relational component of the family? Taking this a step further, in the context of marriage, parental consent is the primary requirement for children marrying under the age of legal majority. The balance between individual vs. relational autonomy in the cases of minor marriages is one that has been given little consideration by lawmakers and has led to a variety of legal difficulties and ethical considerations that shall be discussed in great depth in Chapter 2.1

Similar issues regarding substituted consent arise in the context of individuals with mental disabilities. For centuries, the families and psychiatric treatment teams of persons with mental disabilities had often unchecked substituted consent powers, leading to an almost complete disenfranchisement of autonomy from the individual themselves.⁴⁶¹ The work of disability advocates in the 20th and 21st centuries has led to a major shift in priority to the protection and honoring of the independent will of persons with mental disabilities.⁴⁶² However, huge issues still remain in ascertaining the legitimate consent of persons with mental disabilities to a variety of life activities and balancing between respecting that consent and protecting the well-being of the individual. These difficulties are particularly challenging in the context of marital consent, which is discussed at length in Chapter 2.2.

Application to Marital Consent

We turn to the question of what theories of consent are applied, or should be applied, to marital consent. Surprisingly little discourse has been dedicated to this question throughout the literature, and what does exist does little to clarify the fundamental understandings of marital consent. For example, while Miller and Wertheimer dedicate extensive review to a variety of social and legal scenarios in their expansive writing on consent transactions, they dedicate only a few short lines to the discussion of consent to marry, concluding simply “the standards of morally transformative consent [in marriage] are not particularly high.”⁴⁶³ This lack of discourse is perhaps best explained by Herring in his conclusion that “family law, at least until recently, has placed

⁴⁶⁰ See Herring (n 378) at 273.

⁴⁶¹ See generally Anti-Defamation League, ‘A Brief History of the Disability Rights Movement’ (2018); Temple Institute on Disabilities, ‘Disability Rights Timeline’ <<https://disabilities.temple.edu/resources/disability-rights-timeline>> accessed 10 February 2025.

⁴⁶² See eg. K Moore, ‘Disabled Autonomy’ (2020) 22 Journal Health Care Law & Policy 245.

⁴⁶³ Miller and Wertheimer (n 240) at 91.

relatively little weight on the idea of autonomy and it is easy to see why.”⁴⁶⁴ As discussed in the previous chapter, marriage throughout history was primarily seen as a tool to integrate families and to build community relations, rather than to advance the happiness of individuals, particularly in the case of wives.⁴⁶⁵ Not until the Victorian era’s growing emphasis on romantic love did the autonomous will of spouses to consent to a marriage gain more importance in society.⁴⁶⁶ Even so, few legal scholars have deeply examined how marital consent has evolved. This thesis must therefore ‘start at the beginning’ in its evaluation of the theories underlying marital consent.

As discussed above, under the traditional model of permissive consent, the consent-giver essentially “opens the door” for an action to occur that would otherwise violate their individual rights. It is possible to imagine applying this model to marital consent, whereby the consent-giving spouse, by virtue of assent, allows the marriage to take place at the behest of the consent-receiving spouse. However, when one thinks critically about the institution of marriage, the permissive model does not provide an appropriate framework. As discussed, permissive consent presumes that an action will occur, and the normative and/or legal character of that action is changed by the giving of consent. It does not account for situations where consent is a necessary element for the action to exist at all, such as the mutual agreement to marriage contract. In this way, marriage more clearly resembles the “consent as agreement” model, corresponding to originating consent theory. Marriage also seems best suited to a view of consent under Healy’s Relational model and the theory of relational autonomy, where consent of the spouses is based on a kaleidoscope of various influences between the parties and from outside factors, such as their family and social backgrounds.

These views of consent also better encapsulate marriage as an ongoing relationship, rather than a one-time exchange. When applied to marriage, the theory of permissive consent can only look at the moment of consent to marry, where one party “opens the gate” for marriage to legally occur. However, the instance of consent to marry is fleeting when compared to the duration of the entire marriage. Through a lens of permissive consent, we cannot look into the ultimate marital relationship to determine if the parties “got what they agreed to” in terms of their satisfaction

⁴⁶⁴ Herring (n 378) at 259.

⁴⁶⁵ See Chapter 1.3.

⁴⁶⁶ See eg. S Coontz, *Marriage, a History: How Love Conquered Marriage* (Penguin books 2006) at 179-180.

with the marriage, nor can we determine the will of the parties to remain married. In contrast, the originating/relational models would allow us to determine the consent of the parties not just at the moment of consent to marry, but throughout the relationship. As Grossi contends, “If we understand agreement as an ongoing and evolving concept then it is not only the relationship that is important but also the context, expectations and impact of the agreement.”⁴⁶⁷ As will be discussed in Chapter 3.3, consent to remain in a marriage is an overlooked, but critical, concept that can best be understood through the lens of originating consent.

In addition, while purely economic contracts may fit more aptly under a model of individual autonomy, whereby actors seek primarily to advance their private financial interests, it is arguable that marriage seems more appropriately rooted in the relational autonomy model, as discussed in overview of relational theorists such as Lecky, Thompson, and Herring above. This view is supported by Fineman, who argues that unlike purely private arenas, “the family is contained within the larger society, and its contours are defined as an institution by law. Far from being separate and private, the family interacts with and is acted upon by other societal institutions.”⁴⁶⁸

When we view consent to marry under the narrower perspective of contract law, we again see the limitations of the current legal system. As stated above, the predominant theory of contracts throughout US courts is Barnett’s consent theory of contracts. As we will discuss in later chapters, this theory has indeed been applied in family courts in the interpretation of marriage contracts.⁴⁶⁹ The consent theory calls for an objective view of the consent of parties to contract, what ethical theory describes as a performative lens, taking their outward manifestations of consent as a reflection of their subjective mental state of assent. Courts have broadly adopted this model as an interpretative method for evaluating the validity of a party’s consent to contract, and correspondingly have imposed default rules on contracts to which the parties are assumed to have agreed to by virtue of their consent to contract.⁴⁷⁰

However, as critics of consent theory have made clear, this model fails to prioritize the myriad of influences that can lead a party to outwardly manifest consent, while lacking valid mental assent.

⁴⁶⁷ Grossi (n 288) at 273.

⁴⁶⁸ M Fineman, *The Autonomy Myth* (New Press 2004) at xviii.

⁴⁶⁹ The application of consent theory to marriage shall be discussed throughout Part III.

⁴⁷⁰ See eg. Barnett (n 399).

Marriage in particular is a decision that is affected by a host of outside influences, including families, religion, social norms, and biological pressures such as parenthood. In addition, as noted by Thompson, marriages that include a dimension of gender disparity cannot be understood as stand-alone agreements; they must be viewed within the reality of systemic inequality that affects both the mental state of a female consent-giver in a marriage and indeed the patriarchal roots of the legal system itself.⁴⁷¹ In these cases, a mentalism view of consent, where we attempt to ascertain the true will of the consenting party beyond her outward manifestations to consent, would seem indispensable in determining the authenticity of consent to marry.

Consent theory's advocacy for the application of default rules is also troublesome in relation to the marriage contract, as the parties of a marriage cannot create their own contract terms; they are bound by the specifics of the contract laid out by the State. Marriage, perhaps uniquely amongst all contracts is one of total adhesion, dictated by entirely mandatory terms, which are "not grounded on parties' shared preferences, but instead based on legislative or judicial judgement of fairness, policy, or efficiency".⁴⁷² Where a general contract of adhesion involves the drafting of terms by only one party that are not modifiable by the other,⁴⁷³ a marriage contract is neither drafted nor modifiable by either of the parties that enter the contract. Instead, it is the State that determines the terms by which the parties must adhere. In this way, the State becomes an invisible quasi-party to the contract in a way that is not often well understood by the parties to be married.

Furthermore, unlike discrete economic contracts, marriage affects the status of the parties in a variety of matters that are likely unknown to them at the time of marital contract (for example medical rights, taxes, social benefits, etc.) In fact, an assessment by the US Government Accountability Office determined that there are over 1000 federal statutory provisions and benefits related to marital status.⁴⁷⁴ Under the consent theory of contract, the parties are viewed as implicitly agreeing to be bound by the default rules applying to married parties, not just under family law, but in a host of other laws that treat a married person differently than a non-married person. Is it in fact reasonable that we assume the parties can comprehend the myriad of legal

⁴⁷¹ See Thompson (n 377).

⁴⁷² Bix (n 289) at 261.

⁴⁷³ See generally Bix (n 289) at 254 (for discussion of contracts of adhesion).

⁴⁷⁴ U.S. General Accounting Office, 'Report on Marriage Rights' (1997).

implications of marriage at the moment of signing? Consent theory says that as this information is hypothetically *knowable* by the parties, application of default legal rules to married parties is just, despite the actual knowledge of the parties at the time of consent. This dissertation will challenge the reasonableness of this presumption of consent to default rules of marriage in later chapters.

Conclusions

Having established the superiority of originating and relational understandings of consent as applied to marriage, perhaps it now becomes evident why consent and marriage are such a fraught topic within US law. The current legal framework appears to be based firmly in a model of permissive consent, which fundamentally cannot encapsulate the relational aspects of a marital agreement. Take for example, as we will see in a later chapter, the few US states that have laws criminalizing forced marriage; each of these laws frame the crime as an imposition of a marriage on a non-consenting party: put another way, as a breach of permissive consent.⁴⁷⁵

Another stark example comes from the phenomenon of child marriage in the US, which will be examined in Chapter 2.1 As will be discussed, most US states allow for the marriage of a minor under 18 with the consent of her parent.⁴⁷⁶ Under a theory of originating consent, such laws are illogical. It prevents an individual under the age of majority from independently providing the requisite consent to create the marital relationship. Under an originating consent theory, without the independent consent of the minor, the agreement itself cannot exist. State exceptions allowing for parental consent are instead rooted in a permissive model, whereby the marriage without the parent's consent would be invalid but is made valid by the parent's consent. We cannot evaluate the consent of the parties through a lens of originating/relational theory because the parent is a mere substituted consent-giver at the moment of agreement to marry, separate from the child who is still part of the marital relationship going forward.

As discussed in Chapter 1.3, family courts throughout history have been reluctant to apply a subjective standard when determining the validity of marital consent and have instead clung fast to an objective standard in line with the consent theory of contract. This is understandable in one sense, as the role of courts is to try to apply the rule of law as justly and uniformly as possible.

⁴⁷⁵ See Chapter 3.1.

⁴⁷⁶ See Chapter 2.1; *see also* Statute Compendium A.

However, as we will see, the adherence to the theories of permissive consent and objective interpretation of marital contracts has led to a matrimonial law system riddled with contradiction, confusion, and ultimately, injustice.

PART II: CAPACITY TO CONSENT TO MARRIAGE

To move beyond the narrow current conceptualizations of forced marriage to a broader understanding of non-consensual marriage, it is critical to distinguish between marriages where consent is inadequate due to the capacity of the parties vs. where consent has been obtained wrongfully (such as by duress, coercion, or fraud). As discussed in the review of existing literature in Chapter 1.2, little discourse has been dedicated to distinguishing between these concepts. Specifically, the marriage of children and persons with mental disabilities certainly raise questions about the capacity of parties to marry, but it is unclear where such marriages fit in the overall debate on forced marriage. While some stakeholders may define the marriage of parties of limited capacity as *per se* forced, does this categorization accurately reflect the nature of these unions? The use of the word “forced” indicates at least a modicum of external pressure on a party to marry, but it is easily imagined that in the case of some children (particularly older minors) and persons with mental disabilities that the party may want to marry based on their independent will.

To say that such marriages do not fit under the definition of “forced” does not necessarily make them morally, or indeed legally, permissible. However, to group them under the blanket terminology of “forced marriage” creates significant problems. For example, if legislators primary aim in addressing child marriages is to eliminate forced marriages, as we shall see has been a main objective in such legislation, they miss critical capacity issues that exist in marriages of minors who did not in fact face external pressure to marry. Here again we see that failure to clearly define non-consensual marriage practices can have direct effects on policymaking.

Accordingly, Part II aims to explore the marriages of parties with limited capacity from a new lens, outside of the narrow forced marriage framework. It will look holistically at the patchwork of current laws that exist to regulate these marriages, as well as recent legislative reform efforts and statements by lawmakers, both in support of and in opposition to these efforts. The result is a clearer distinction between marriages of parties of limited capacity and the marriages of wrongfully procured consent, which shall be discussed in Part III. This understanding is critical to the building of a more holistic understanding of non-consensual marriage.

2.1 Children

After seemingly sitting dormant for several decades, the issue of child marriage has regained a resurgence in attention over the past several years. While many believed that the marriage of children was a remnant of a bygone era, recent advocacy efforts have shed light on the legislative loopholes that allow children under the age of majority to marry in almost all states. The most recent data indicates that an estimated 300,000 minors were married in the US between 2000-2018,⁴⁷⁷ a statistic that has shocked many Americans and prompted a flurry of reform bills. Child marriage has become a hot-button issue for legislators, media outlets, and nonprofit advocates; yet despite this focus, the legislative landscape of child marriage is one that is still mired in contradictions and confusion, as we shall see in this chapter.

The issue of child marriage is particularly relevant to this thesis' evaluation of marital consent. It highlights the tensions between the idealized picture of American marriage, one with enthusiastically consenting parties, and the reality of the law, as child marriage allows for the marriage of individuals who lack legal capacity in most other areas. This chapter will explore marital consent in the context of child marriage and attempt to glean an overall understanding of how consent is determined and valued in relation to these marriages. It will first lay out the historical debate on children's rights and decision-making capacity, particularly in relation to entering contractual relationships. Next, it will extensively explore the categories of laws across US states related to the marriage of children, including parental consent, judicial approval, "Romeo and Juliet" rules, emancipation, pregnancy, and statutory rape. Finally, it will delve into the recent debate on the modification of these laws, identifying key arguments from legislative reports and gubernatorial statements. This exploration will investigate the reasoning espoused by policymakers who either support or oppose the elimination of child marriage in the US and situate these arguments in the context of children's rights discourse. The result is a comprehensive picture of the state of child marriage in the US legal system.

⁴⁷⁷ F Reiss, 'Child Marriage in the United States: Prevalence and Implications' (2021) 69 *Journal of Adolescent Health* 58.

Background on Children's Rights and Decision-Making Capacity

In order to examine the relationship between children and marital consent, it is important to establish briefly the historical and theoretical reasoning underlying children's rights and decision-making capacities. This thesis will not attempt to provide an examination of the physiological development of children, nor an examination of the neurobiological capacity of children to understand consent. Rather, this evaluation will hinge on the relationship between the general *legal* capacity granted by the State to children, and the varying levels of marital consent that states accept for the practice of child marriage.

From children as property to children as rights-holders

For much of Western legal history, children have been seen as the legal chattel of their parents (usually their father), without individual rights until they reached adulthood. From antiquity, children's very lives were completely within the control of their parents, with ancient Roman fathers being permitted to abandon a child without risk of legal repercussion.⁴⁷⁸ It was not until the rule of Constantine that the law began to recognize children as independent individuals, but even then, the law still regarded children as primarily the property of their parents.⁴⁷⁹ In the US, childhood did not receive official legal status until the post-Reformation era, where a greater concern for the vulnerability of children began to gain public sentiment.⁴⁸⁰

This long history of parents' dominion over their children is supported by traditional theorists of children's roles in society, who prioritize the authority of the parent and the privacy of the family unit. For example, Freud and Solnit argued that government take a "laissez-faire" approach to the regulation of parental behavior towards their children with the privacy of the family being held in strict regard.⁴⁸¹ A more recent traditionalist, Guggenheim, likewise supports a model of parental rights, where children have no individual rights within the family and parents are viewed as the best parties to act in the best interest of their children.⁴⁸²

⁴⁷⁸ See eg. SR Arnott, 'Autonomy, Standing, and Children's Rights' (2007) 33 WM Mitchell Law Review 807 at 809-810.

⁴⁷⁹ *ibid* at 810.

⁴⁸⁰ See H Brewer, *By Birth or Consent: Children Law and the Anglo-American Revolution in Authority* (University of North Carolina Press 2005) at 103; see also Arnott (n 354) at 812.

⁴⁸¹ See J Goldstein, A Freud and A Solnit, *Beyond the Best Interests of the Child* (New York Free Press 1973).

⁴⁸² See M Guggenheim, *What's Wrong With Children's Rights?* (Harvard University Press 2005).

Towards the end of the 19th century, however, a revolution in children's rights began to emerge, with advocates arguing that children have a special place in society as a result of their age and therefore require increased governmental protection.⁴⁸³ The Fair Labor and Standards Act of 1938 set for the first time federal limits on the working age of children under 16 in the US.⁴⁸⁴ Along with new limitations on child labor came additional pushes for governmental protection of children's health and wellbeing. Whereas any rights held by children had traditionally been perceived as mere extensions of their parents' rights, the Supreme Court in *Re Gault* held that children had individual Constitutional rights, stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁴⁸⁵ Likewise, while the physical abuse of children had for centuries remained shrouded under the societal acceptance of corporal punishment, there was a growing recognition that children were individuals who, like adults, should not be subjected to physical abuse without recourse in the law.⁴⁸⁶ The Child Abuse Prevention and Treatment Act of 1974 cemented the country's most expansive legislation on the fair, ethical, and legal treatment of children.⁴⁸⁷

Such progress resulted in both an advancement of certain children's rights, but also simultaneous limitations on the actions of children. The recognition of children as distinct legal persons from their parents was coupled with a growing recognition of the limitations of children's capacity and subsequent restrictions on the ability for children to engage in "adult" behaviors. There was an underlying consensus that children under a certain age could not appreciate dangers to their health and must therefore be statutorily limited from participating in certain actions, such as sexual intercourse.⁴⁸⁸ However, despite this increase in child protectionist policies, courts still often rejected the intervention of government into the "private sphere" of the family, particularly the treatment of children by their parents. For instance, in *DeShaney v. Winnebago County*, the mother of Joshua DeShaney brought suit against the government for failing to intervene in the

⁴⁸³ See generally Oud Brewer (n 480); T Cockburn, 'Authors of Their Own Lives? Children, Contracts, Their Responsibilities, Rights and Citizenship' (2013) 21 The International Journal of Children's Rights 372; O O'Neill, 'Children's Rights and Children's Lives' in P Alston, S Parker and J Seymour (eds), *Children Rights and the Law* (Clarendon Press 1992).

⁴⁸⁴ Fair Labor and Standards Act 1938, 29 U.S.C. § 203.

⁴⁸⁵ *In re Gault* (1967) 387 US (US Supreme Court).

⁴⁸⁶ See generally D Gil, 'Opinions and Attitudes', *Violence against Children* (Harvard University Press 1973).

⁴⁸⁷ Child Abuse Prevention and Treatment Act 1974, Public Law No: 93-247. Child Abuse Prevention and Treatment Act 1974 (It should however be noted that all still permit limited forms of corporal punishment against children in the home).

⁴⁸⁸ See Chapter 1.4.

severe abuse of Joshua by his father, which left Joshua permanently disabled.⁴⁸⁹ Local government agencies, including the state child protection agency, had been made repeatedly aware of the abuse, but did not intervene to remove Joshua from his father's custody. His mother claimed that Joshua's due process rights guaranteed him governmental protection and intervention against abuse. The Supreme Court rejected this assertion, finding that the state had no obligation to provide affirmative protection to children against private actors⁴⁹⁰. While children may have been accepted as rights holders, courts have often been loath to enforce those rights against parents directly.

As a result of, and as a response to, the increase in child protection advocacy in the early to mid-20th century, the children's liberationist movement emerged in the 1970s as a new theory of children's rights.⁴⁹¹ Liberationists such as Holt argued that children should have the autonomy and independence to engage in almost every area of adult life, including voting and sexual intercourse.⁴⁹² For liberationists, to limit children's decision-making capacity as a result of their age was to deny their status as rights holders. Farson concurred with this expansive view of children's decision-making autonomy, stating that "the issue of self-determination is at the heart of children's liberation. It is in fact, the only issue, a definition of the entire concept."⁴⁹³ More modern liberationists such as Franklin argue that even young children should be deemed capable of making independent choices in their own interest.⁴⁹⁴

While liberationists sought to empower children to minimize the abusive actions of adults towards them, these theories have come under considerable scrutiny. Fortin, for example, notes in her exploration of children's rights theory that modern research has indicated that "liberationists' ideas were based on an unrealistic perception of children's capacities."⁴⁹⁵ Harding likewise asserts that a complete failure to recognize and regulate childhood could, in spite of liberationist intent, lead to even greater exploitation of children.⁴⁹⁶

⁴⁸⁹ *Deshaney v Winnebago County Dep't of Social Services* (1989) 489 US 189 (US Supreme Court).

⁴⁹⁰ *ibid.*

⁴⁹¹ See J Fortin, *Children's Rights and the Developing Law* (Cambridge University Press 2011).

⁴⁹² See J Holt, *Escape from Childhood: The Needs and Rights of Childhood* (EP Dutton and Co Inc 1974).

⁴⁹³ R Farson, *Birthrights* (Collier Macmillan 1974).

⁴⁹⁴ See B Franklin (ed), *The New Handbook of Children's Rights: Comparative Policy and Practice* (Routledge 2002).

⁴⁹⁵ Fortin (n 491) at 5.

⁴⁹⁶ LF Harding, *Perspectives in Child Care Policy* (Longman 1997) at 134.

Reconciling children's rights and protection

In response to the tension between child protectionists and children's liberationists, a new theory of children's rights has emerged, which prioritizes the future interests of children, rather than their ability to immediately assert their rights while under the age of majority. Under this interest theory of children's rights, children have interests in their future autonomy, even if they are too young to exercise such autonomy in the present due to their lack of capacity.⁴⁹⁷ An interest model seeks to protect the moral and legal rights of children until they attain capacity to reach reasoned decisions.

The seminal theorist of the interest model of children's rights, John Eekelaar, argues for a "hypothetical retrospective judgement" approach, where decision makers attempt to hypothesize what a child might retrospectively have wanted once she reaches a position of maturity.⁴⁹⁸ Eekelaar separates such interests into three categories: 1) basic, which concerns the immediate well-being and care of the child, 2) developmental, which relates to the child's claims on wider community to maximize her individual potential, and 3) autonomy, which provides for the child's freedom to choose her own lifestyle and to enter social relations.⁴⁹⁹ Eekelaar proposes that in any decision regarding a child, the decision-maker must take an expansive view of the effect of these decisions on all three of these interests of the child that must be preserved until they reach maturity.

Eekelaar was particularly interested in expanding the model by which the judiciary, often tasked with acting in the "best interest" of a child, understands the true views of a child and a protection for their future interests.⁵⁰⁰ He was concerned that judicial officials act in a coercively paternalistic manner, often ignoring the voice of the child. As a response, he proposed "dynamic self-determinism", whereby the judiciary would take into account the continuously developing capacity of children to make decisions and would give weight to this growing autonomy.⁵⁰¹ Eekelaar's interest model and recommendations for dynamic self-determinism are all aimed at

⁴⁹⁷ See generally J Eekelaar, 'The Emergence of Children's Rights' (1986) 6 Oxford Journal of Legal Studies.

⁴⁹⁸ *ibid* at 170.

⁴⁹⁹ *ibid* at 170-171.

⁵⁰⁰ *ibid* at 206-207.

⁵⁰¹ J Eekelaar, 'Families and Children: From Welfarism to Rights' in C McCrudden and G Chambers, *Individual Rights and Law in Britain* (Clarendon Press 1994) at 53.

the goal of allowing the child to reach adulthood with the maximum opportunities that comport as closely as possible to the child's autonomous choice.

Other advocates of the interest model, such as MacCormick, cite such examples of the child's right to education as a use of this model.⁵⁰² The right to education is not enforced by the child, but by adults on the child's behalf so that she may have the ability to act as an educated and autonomous adult when she reaches the age of majority. The priority of preserving the child's future interest in her education can be levied as a right against a government that might deny that education and as a justification to compel the child to receive an education, even against the child's own express wishes.⁵⁰³ O'Neill similarly emphasizes that children's rights should be thought of in terms of the obligations owed towards them, not children's individual exercise of those rights.⁵⁰⁴

However, even some staunch advocates of the interest-based model recognize the difficulty of practical application of the model across issues affecting children. Campbell, for instance, supports an interest model but acknowledges that it creates an exceptionally broad framework for the determination of children's rights.⁵⁰⁵ Bevan highlights the tensions between the desire to protect children, while simultaneously honoring their burgeoning autonomy. He suggests the broad categorization of children's rights into two, sometimes competing factions: 1) protective, which stems from children's vulnerability and need for care (such as the child's right against ill treatment) and 2) self-assertive, which protects the child's claim to adult human rights (such as bodily autonomy and self-determination).⁵⁰⁶ Feinberg similarly separates children's rights into their immediate rights vs. their rights to an "open future", where respect for a child's future autonomy as an adult may often result in a prevention of the exercise of her complete free choice in the present.⁵⁰⁷

⁵⁰² See N MacCormick, *Legal Right and Social Democracy: Essays in Legal and Practical Political Philosophy* (Clarendon Press 1982).

⁵⁰³ See *ibid.*

⁵⁰⁴ See O'Neill (n 483).

⁵⁰⁵ See T Campbell, 'The Rights of the Minor' in P Alston, S Parker and J Seymour (eds), *Children Rights and the Law* (Clarendon Press 1992).

⁵⁰⁶ H Bevan, *Child Law* (Butterworths 1989) at 11.

⁵⁰⁷ J Feinberg, 'The Child's Right to an Open Future' in W Aiken and H LaFollette (eds), *Whose Child?* (Littlefield, Adams & Co 1980) at 126-127.

This form of justified paternalism, as supported by MacCormick and Raz, allows for decision-makers to override the express wishes of a child, but only insofar as that decision is made with the express aim at protecting the child's ability to live autonomously in her adult life.⁵⁰⁸ This paternalism is a departure from the traditional "parental rights" model in its prioritization of the child's interests, rather than simply the parent's power. However, in practice, a model of justified paternalism still puts the decision-making power over children firmly in the hands of their parents and guardians.

Modern children's rights

The heated discourse on children's rights throughout the 20th century has left the legal status of children in the modern era in a state of relative limbo. Children are seen as independent rights bearers, but their actions are severely curtailed by state legislation. For example, age restrictions on activities such as driving an automobile, drinking alcohol, getting a tattoo, and even using a tanning bed are now in place throughout the US.⁵⁰⁹ Of particular concern to the assessment of children's marital consent is the right of children to contract and their right to legal standing.

Children have severely limited contract rights throughout US jurisdictions. At the common law, a minor who enters into a contract is able to cancel that contract at any time prior to reaching the age of majority and for a reasonable period after that time.⁵¹⁰ Likewise under the Uniform Commercial Code, which governs contracts for goods, infancy is a defense to simple contract formation.⁵¹¹ While courts will enforce contracts with minors for "necessities", such as food, water, and in some cases, housing, children are generally deemed to have limited capacity to contract.⁵¹² However, the right to void a contract made in infancy lays with the child, which indicates some level of agency by that child, even in the face of a rule that specifically denies their capacity to contract.⁵¹³ In addition, there is not a uniform definition of what constitutes a "necessity", for which a child could validly contract, and a broad interpretation of this principle could lead to varying results across cases.

⁵⁰⁸ See MacCormick (n 378) at 166; J Raz, 'Liberty and Trust' in R George (ed), *Natural Law, Liberalism and Mortality* (Oxford University Press 1996) at 121.

⁵⁰⁹ See M Cramer, 'When Are You Really an Adult?' *New York Times* (19 January 2020).

⁵¹⁰ See eg. Cockburn (n 359) at 376.

⁵¹¹ Uniform Commercial Code, 3-305(a)(1).

⁵¹² See Cockburn (n 359) at 376.

⁵¹³ See eg. *ibid.*

Likewise, children's standing to bring suit in court is an unsettled area that leaves open many questions of their legal capacity. Most US jurisdictions will not allow a child to independently bring a suit, but instead must rely on an adult to act as a "next friend" to bring the suit on the child's behalf.⁵¹⁴ This principle is reflected in the Federal Rules of Civil Procedure, which dictate that a child cannot initiate or defend a lawsuit without adult assistance.⁵¹⁵ However, these rules are far from uniform in their application. Take for example two conflicting cases from Florida, decided in the same year. In *Kingsley v. Kingsley*, the Florida District Court of Appeals denied standing to a minor seeking to bring suit in court, declaring that she must instead avail of a next friend to initiate the case on her behalf.⁵¹⁶ However in *Twigg v. Mays*, the Florida Circuit Court ruled that a minor did in fact have standing to bring her own suit as a "natural person" under the law.⁵¹⁷ These differing standards have not been reconciled in Florida, nor across US jurisdictions, with courts seemingly taking a case-by-case approach to the determination of children's standing to sue.

With the status of children's right to contract and right to legal standing so unsettled, it is perhaps no wonder that the issue of a child's right to consent to marriage is unclear. As shall be discussed in the next section, every state sets the age of unrestricted marriage at the age of majority, but exceptions exist in almost every state that allow for adults, such as parents or judges, to permit the marriage. A children's liberationist's view would support that children should have unfettered marital consent, without the need for parental or judicial approval, as part of a child's individual right to marry. In contrast, supporters of the interest model may argue that a parent providing vicarious consent for a child to marry in fact denies her of her future interest in exercising her free choice to marry once she reaches the age of capacity. We will explore these arguments more closely by reviewing the current exceptions that exist to permit child marriage throughout the US and their justifications by lawmakers.

⁵¹⁴ *ibid.*

⁵¹⁵ Federal Rules of Civil Procedure, 17(c).

⁵¹⁶ *Kingsley v Kingsley* (1993) 623 So 2d 780 (Florida District Court of Appeals).

⁵¹⁷ *Twigg v Mays* (1993) 330624 WestLaw (Florida Circuit Court).

Child Marriage Laws Across the US

Child marriage as a practice in the US is in a time of tremendous flux. Only four states have not taken recent action to alter their marriage-age laws.⁵¹⁸ All other states have had bills introduced and/or passed that either limit or eliminate exceptions that permit child marriage. However, at time of writing, only 16 states prohibit the marriage of minors in all circumstances.⁵¹⁹ In the remaining 34 states, a variety of exceptions allow for the marriage of individuals under 18. While many of these bills start with a complete elimination of exceptions, fierce debate by lawmakers has led to the majority of this legislation being struck down or altered to permit continuing exceptions. The reasoning behind this pushback varies significantly between states, as well as between individual legislators. The following section addresses the many iterations of child marriage legislation across the US by looking both at the statutory language of these provisions and statements by policymakers on the reasoning behind these varied laws.

Brightline statutes

As stated above, 16 states have enacted “brightline” legislation that prohibits child marriage under any circumstances. For policymakers in favor of these statutes, the most cited justification is child protection. For instance, Representative Kim Williams, sponsor of the 2018 Delaware bill which became the country’s first enacted brightline law, stated that her reasoning behind the bill was a concern for the negative repercussions associated with underage marriage:

Children who get married under the age of 18 have a tendency of being in more abusive relationships, dropout of high school and so minds are still developing... [I] just feel that 18 years of age is a point where they can start making decisions for themselves.⁵²⁰

Lieutenant Governor Susan Bysiewicz echoed this concern for the effects of marriage on children in her support of Connecticut’s brightline bill:

⁵¹⁸ North Dakota, Iowa, Nebraska, and Alabama. *See* Unchained At Last (n 16).

⁵¹⁹ Connecticut, Delaware, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New York, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington. Statute Compendium A. Washington DC, while not included in this assessment, also prohibits all child marriage.

⁵²⁰ ‘Proposed Legislation Would Ban All Child Marriages in Delaware’ *Delaware Public Media* (17 March 2018) <<https://www.delawarepublic.org/politics-government/2018-03-17/proposed-legislation-would-ban-all-child-marriages-in-delaware>>.

When we allow child marriage, we deprive children of their childhood, and their future...The legislature has set a number of reasonable restrictions for persons under the age of 18, and through this new law we are eliminating a practice that undermines our children's health, safety, education, and future economic opportunities.⁵²¹

Michigan Governor Gretchen Whitmer argued children in the state must be protected against child marriage as a matter of their safety, saying:

I am committed to keeping Michiganders—especially young women—safe and healthy, and today's bipartisan bill fully implements Michigan's ban on child marriage... Together, we can make Michigan a safe, welcoming place where everyone can envision a bright future for themselves.⁵²²

Michigan Representative Joey Andrews, sponsor of the state's brightline legislation, similarly stated:

Protecting children is paramount to me, both as a legislator and a father...My colleagues and I have demonstrated that with the bills we've passed this term that keeping kids safe is a critical issue, and I'm proud to be part of that effort by sponsoring this bill.⁵²³

When signing New Jersey's brightline bill, Governor Phil Murphy cited statistics related to negative outcomes on children who marry:

In New Jersey, we are dedicated to protecting children by putting an end to child marriages by raising the minimum age to 18...Studies have consistently showed that minors who enter into marriage – particularly young women – are less likely to graduate from high school and college and more likely to suffer domestic abuse and live in

⁵²¹ 'Rep. Keitt Applauds Passage & Signing of Bill Banning Child Marriage in Connecticut' *Connecticut House Democrats* (23 June 2023) <<https://www.housedems.ct.gov/node/25849>>.

⁵²² 'Gov. Whitmer Signs Final Bill in Package Protecting Children, Officially Banning Child Marriage in Michigan' *Office of Governor Gretchen Whitmer* (27 September 2023) <<https://www.michigan.gov/whitmer/news/press-releases/2023/09/27/whitmer-signs-final-bill-in-package-protecting-children-officially-banning-child-marriage>>.

⁵²³ *ibid.*

poverty. I am proud to join with the Legislature to make New Jersey a national leader on this important human rights issue.⁵²⁴

Such reasoning is firmly in line with a child protectionist perspective, particularly an “interest” based model, which looks forward at the future repercussions that children may face as a result of marriage. Under this forward-looking perspective, even if the child independently expresses a desire to marry, lawmakers still have a significant interest in prohibiting the marriage to protect children from potential negative consequences that have been associated with such marriages.

Other advocates of brightline legislation argue that child marriage as a practice leaves the door open for exploitation of minors by adults. For example, Pennsylvania Governor Tom Wolf, when signing the state’s brightline bill, expressed concerns over the exploitation of children by adults through marriage:

Setting the minimum age to obtain a marriage license will help prevent child exploitation...marriage is a sacred and serious commitment that should be undertaken with love by two adults, not by children being exploited by unscrupulous adults.⁵²⁵

Rhode Island Governor Dan McKee also used the language of “exploitation” in his statement when signing the state’s brightline bill saying, “I am pleased that Rhode Island is joining several other states in this effort to protect children and prevent exploitation.”⁵²⁶ Sponsor of Minnesota’s brightline bill, Representative Kaohly Her, echoed the language of child marriage as a form of “exploitation” stating:

⁵²⁴ ‘Governor Phil Murphy Signs Child Marriage Ban into Law’ *Office of Governor Phil Murphey* (22 June 2018) <https://www.nj.gov/governor/news/news/562018/20180622b_child_marriage_ban.shtml>.

⁵²⁵ H Kaur, ‘Pennsylvania Has Become the Latest State to Ban Child Marriage – but It’s Still Not Fully Outlawed in 47 Others’ *CNN* (11 May 2020) <<https://edition.cnn.com/2020/05/11/us/pennsylvania-outlaws-child-marriage-trnd/index.html#:~:text=Tom%20Wolf%20signed%20into%20law,of%20a%20parent%20or%20guardian.>>>.

⁵²⁶ ‘Governor McKee Signs Two Bills into Law’ *Office of Governor Dan McKee* (7 June 2021) <<https://governor.ri.gov/press-releases/governor-mckee-signs-two-bills-law>>.

This is an important step to stop the exploitation of vulnerable Minnesotans...700,000 people around the world were married as children, some of them here in Minnesota. For many, their marriages meant a lost childhood and years of abuse, poverty, and illness.⁵²⁷

Michigan State Representative Kara Hope called child marriage “abusive” in her praise of the state’s brightline bill saying, “I’m elated that children in Michigan will be protected from the archaic, abusive practice of child marriage.”⁵²⁸ Senator Sandra Pappas, sponsor of Minnesota’s brightline bill, cited similar concerns of children being “coerced” into marriage:

This legislation will protect children from being coerced into marriage they cannot easily escape. Marriage at this young age has devastating lifelong repercussions such as higher poverty rates, reduced economic opportunities, and increased mental health issues.⁵²⁹

New Hampshire Representative Cassandra Levesque, a champion of the elimination of child marriage in the state since she herself was a teenager,⁵³⁰ used even more stark language on the potential exploitation of children through marriage:

There are so many problems when it comes to child marriage. It opens up a door to human trafficking. It allows rapists to marry their victims. It allows for girls to basically not get to become the full potential that they can be...Raising [the marriage age] to 18 shows the rest of the country that we want our girls to live to their full potential, that they can be and choose the lives that they want.⁵³¹

New York Assemblymember Phil Ramos took a particularly hardline view of child marriage as a method of child exploitation stating, “Child marriages have been determined by the UN to be

⁵²⁷ ‘Governor Walz Signs Bill to End Child Marriages’ *Minnesota House of Representatives* (14 May 2020) <<https://www.house.mn.gov/members/profile/news/15532/29817>>.

⁵²⁸ ‘Gov. Whitmer Signs Final Bill in Package Protecting Children, Officially Banning Child Marriage in Michigan’ (n 522).

⁵²⁹ ‘Governor Walz Signs Bill to End Child Marriages’ (n 527).

⁵³⁰ See E Trickey, “‘Why Is Child Marriage Still Legal?’: A Young Lawmaker Tackles a Hidden Problem’ *Politico* (9 January 2022).

⁵³¹ S Gibson, ‘NH Outlaws Child Marriage, Raising the Legal Age to 18’ *New Hampshire Public Radio* (18 June 2024) <<https://www.nhpr.org/nh-news/2024-06-18/nh-outlaws-child-marriage-raising-the-legal-age-to-18>>.

akin to slavery, and it has no place in our state or in our country.”⁵³² Sponsor of Washington’s brightline bill, Representative Monica Stonier, likewise specifically identified the risk of “forced” marriage as a justification for the elimination of child marriage:

This bill will protect young people from being forced into or entrapped in a marriage that could be dangerous or abusive...Marriage should never be used as a weapon to coerce a child into sex...Changing the legal age for marriage to 18 gives young people greater autonomy over their futures and eliminates a harmful legal loophole.⁵³³

These statements highlight the belief of policymakers that children are particularly vulnerable to coercion to marry, and subsequently to sexual exploitation. Their statements do not always make clear what parties are the greatest risk to children, as such concerns could be aimed at adults who marry children, parents consenting to the marriage of their children, or other parties. However, these statements shed light on the concerns of potential force and coercion of children underpinning the push for brightline legislation.

Beyond child protection arguments, some advocates for brightline legislation cite a need for clearer marriage laws and legislative consistency as a primary motivator for such bills. For instance, Senator Debra Altschiller of New Hampshire highlighted the need to keep the marriage age consistent with the state’s general contract age stating, “Marriage is more than a love story; it’s a legal contract. If you’re not legally able to get out of a contract, you shouldn’t be able to get into one.”⁵³⁴ The office of Vermont’s Governor, Phil Scott, likewise noted his concern for the consistency of state laws and child marriage stating, “The governor has always felt that consistency is important. So, consistency in regard to the legal age of consent makes sense, as well.”⁵³⁵

⁵³² ‘Assembly Passes Legislation to Expand Protections in the Child Marriage Law, Making 18 the Age of Consent to Marry’ *Office of Assembly Speaker Carl E. Heastie* (3 June 2021) <<https://assembly.state.ny.us/Press/?sec=story&story=97376>>.

⁵³³ ‘Stonier Bill to End Child Marriage in WA Signed by Governor’ *Office of Representative Monica Stonier* (8 March 2024) <<https://housedemocrats.wa.gov/stonier/2024/03/08/stonier-bill-to-end-child-marriage-in-wa-signed-by-governor/>>.

⁵³⁴ Gibson (n 531).

⁵³⁵ O Pintair, ‘Phil Scott Signs Bill Raising the Legal Age for All Marriages in Vermont to 18 Years Old’ *Vermont Digger* (20 April 2023) <<https://vtdigger.org/2023/04/20/phil-scott-signs-bill-raising-the-legal-age-for-all-marriages-in-vermont-to-18-years-old/>>.

Connecticut's brightline bill sponsor, Representative Sarah Keitt, noted that consistency in marriage age is pivotal across states to prevent "child marriage destination" havens:

It's about time Connecticut closed the loophole that allowed 16- and 17-year-olds to get married. Connecticut was one of the few states in New England that had this loophole, and we certainly didn't want our state to become the child marriage destination of the East.⁵³⁶

Virginia Delegate Karen Keys-Gamarra noted that eliminating child marriage in the US was necessary to be consistent not just amongst states, but with international standards, saying: "[Brightline legislation] would bring the commonwealth into alignment with international norms established by groups like the United Nations, which seeks to end child marriages by 2030."⁵³⁷

The above statements are taken from policymakers who have been successful in implementing brightline legislation in their states. However, such states are in the minority. In the rest of the US, major exceptions exist allowing for the marriage of minors. A comprehensive review of state statutory law has revealed six types of exceptions that allow for child marriage: pregnancy, "mature teens", parental consent, judicial approval, "Romeo and Juliet" exceptions, and emancipation. We turn now to those exceptions and the fervent supporters of the continuation of child marriage under these provisions.

Pregnancy

The least common, yet most highly contested, child marriage exception is for pregnancy. Only three states permit a child to marry on the basis of the pregnancy of one of the spouses. The most limited of these, in Arkansas, requires that one of the spouses be pregnant, and that the marrying child obtain both parental consent and judicial approval.⁵³⁸ In Maryland, generally children aged seventeen require parental consent to marry, but the pregnancy of one of the parties is also sufficient for the approval of the marriage license.⁵³⁹ Finally, in perhaps the country's most controversial remaining child marriage statute, Oklahoma allows children of any age to marry if

⁵³⁶ 'Rep. Keitt Applauds Passage & Signing of Bill Banning Child Marriage in Connecticut' (n 521).

⁵³⁷ B Paviour, 'Virginia Might End "Loophole" in Child Marriage Law' *Virginia Public Media* (5 February 2024) <<https://www.vpm.org/news/2024-02-05/virginia-child-minor-marriage-parental-consent-emancipation-law>>.

⁵³⁸ AR Code § 9-11-102; § 9-11-103; § 9-11-209. Statute Compendium A.

⁵³⁹ M.F.L.C § 2-301. Statute Compendium A.

one of the spouses is pregnant.⁵⁴⁰ No other form of approval, either from a parent or judge, is required if pregnancy can be demonstrated.

Prior to the recent surge of child marriage reform efforts, several other states statutes contained a pregnancy exception. When reform efforts took root in the mid-2010s, these exceptions were swiftly altered or repealed upon public outcry.⁵⁴¹ The level of scrutiny of pregnancy exceptions is however at odds with the rhetoric of lawmakers seeking to maintain provisions allowing for child marriage. Research for this thesis found pregnancy to be by far the most commonly cited excuse for maintaining exceptions to allow for child marriage across the US. Representative George Moraitis of Florida, for instance, repeatedly rejected efforts to alter the state's child marriage exceptions due to concerns about pregnant children. In a subcommittee debate on such a bill in 2017, Representative Moraitis stated: "I do support the part of the bill that gets rid of a marriage between logistic consent of the adults, which I guess is 16 and 17-year-olds, but I don't support the part where someone who is pregnant can't get married just because they are under 18..."⁵⁴²

When the bill continued to committee, Representative Moraitis continued to oppose the legislation from both a personal and political standpoint, stating:

I will just say that my mother-in-law got pregnant at 15 with my wife and there was this discussion about perhaps an abortion. The family felt like the couple should get married and they did. Yes, 15 or 20, years later they got divorced. My wife's alive, she has a beautiful relationship with her mother. I just feel like the message is it's better to not be pregnant, perhaps then at least get married. I think we are really forgetting what is in the best interest of the child. We have heard a lot about whether it's bad for girls to get married when they are young, and I agree I wouldn't encourage my own children to get married when they are young, but once you have the context of a child it's completely different...I am very strongly pro-life, it doesn't mean that everyone needs to agree with me on this, but I just feel that we want to encourage women to be married if they are going to have children. And as we've said, pregnancies happen. The question is how do

⁵⁴⁰ Okla. Stat. Title 43 § 3; § 5. Statute Compendium A.

⁵⁴¹ See eg. Tahirih Justice Center, 'Ending Child Marriage in the United States: Progress, Lessons Learned, and Where We Go from Here' (6 November 2023) <<https://www.tahirih.org/news/ending-child-marriage-in-the-united-states-progress-lessons-learned-and-where-we-go-from-here/>>.

⁵⁴² Florida House Civil Justice & Claims Subcommittee, Hearing on HB335, 8 November 2017.

we respond to it as a society and what do we intend to encourage and I am afraid that we're encouraging a different type of decision than having the child. You know, the quickest way for poverty in America is for a single mother. Study after study shows that the best thing for a child is a mom and a dad married.⁵⁴³

Florida Representative Erin Grall echoed concerns about pregnant teens stating:

We all know someone or a couple that got pregnant towards the end of high school, decided to get married, and have a long successful marriage.... Because they have visited a doctor, they have a doctor's confirmation, they have verification of paternity, they have parental consent, and so they have the buy-in from their parents, who have looked at the relationship and said this is what is in the best interest of these children right now and I understand at 16 you are still a child. However as soon as you have a child your level of responsibility changes...we've seen just the degradation of the family unit over the last 30 or 40 years in this country and you have some people that are committed to what it means to raise a child together and that can happen at 16, 17, 18 and we should support the opportunity for those families to come together before the birth of a child and decide to raise them.⁵⁴⁴

Texas Representative Vicente Gonzalez took an extreme view of the dangers of unmarried teen pregnancy stating:

One of the worst things in the world that you can be, as it relates to poverty, is to be pregnant as a teenager. To be pregnant as a teenager will pretty much put you down the road towards self-propagating poverty. Worse than that is to be single, is to be single and pregnant. I am not saying that a 10-year-old who is pregnant or a 12-year-old who is pregnant should be forced into marriage. That to me brings to mind statutes of child abuse, brings to mind statutes of rape and brings to mind other statutes that were probably more properly applied here than this glaring and misguided exception to the child pregnancy statute as it relates to marriage. I shudder to think what the situations that we

⁵⁴³ Florida House Judiciary Committee, Hearing on HB355, 1 February 2018.

⁵⁴⁴ *ibid.*

would be infringing on by passing this overly broad correction to a narrow very specific problem.⁵⁴⁵

Similar concerns were reflected in the House of Representatives of Georgia in 2019.

Representative Jesse Petrea raised this query stating:

If a young woman and a young man were 16 and they were to become pregnant together, they would not be able to marry if we were to pass this bill. Is that correct? If they chose to marry and have that child in wedlock, they would not be able to do this until the age of 17 if this bill were to pass. Is that correct?⁵⁴⁶

The rationale behind such arguments for the allowance of child marriage in the case of pregnancy has been discussed and criticized in Chapter 1.3. These legislators again illustrate the unshakable fear of unwed motherhood and idealized view of marriage that have been promulgated by lawmakers throughout history. Also on display in these statements are the strong emotional and personal beliefs underlying such justifications, and a significant lack of data-driven analysis by legislators in assessing the long-term impact of marriage on pregnant children.

“Mature teens”

Of the states that maintain exceptions allowing for child marriage, most restrict the lowest age of marriage possible to either 16⁵⁴⁷ or 17.⁵⁴⁸ While teens of this age are still under the age of majority, and in some states the age of sexual consent⁵⁴⁹, policymakers continually cite these older “mature” teens as needing special provisions allowing for their marriages. For example, Representative Vicente Gonzalez of Texas argued that 16 was a turning point in maturity for teens:

⁵⁴⁵ *ibid.*

⁵⁴⁶ Georgia House of Representatives, Hearing on HB228, 2 February 2019.

⁵⁴⁷ Alabama, Alaska, Arizona, Colorado, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Missouri, Montana, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, Wyoming. Statute Compendium A.

⁵⁴⁸ Florida, Georgia, Kentucky, Maryland, Nebraska, Nevada, Ohio, Oregon, Tennessee. Statute Compendium A.

⁵⁴⁹ In Colorado the Idaho, the youngest age for sexual consent is 18, while the lowest possible marriage age is only 16. Statute Compendiums A and D.

The fact is that a lot of things happen when we turn 16. A lot of things happen, we are sophomores and juniors in high school...For us as a state to say that we are in a position to pass judgment on the quality and the trueness of your love after you hit 16 years of age to tell you that you will be forced to not accompany that spouse wherever that spouse may go I think is an overstepping of our legislative authority.⁵⁵⁰

Florida Representative Rachel Plakon shared this sentiment from a personal perspective stating, “When some of the proponents came in and saw me about the bill I did say at the time that I felt a little uncomfortable specifically about the 16 and 17-year-olds and I told them I was speaking as a person whose mom was 17 when I was conceived.”⁵⁵¹ Maine Representative Christopher Babbidge spoke of specific concerns for “mature” teens stating:

Are there other situations in which you feel a mature 17-year-old might not be able to use her free will to make that decision? I’ll just ask that because I think that’s a question that does need to be answered. And I realize when I say mature 17-year-old, that’s problematic, but yes, I wanted you because you are a young adult that’s obviously very capable.⁵⁵²

Delegate Susan McComas of Maryland referenced romantic intentions as a justification for the marriage of older teens saying, “Perhaps 17 is kind of young to get married too, but I know that there are all kinds of different circumstances and kids are you know, there may be this love at first sight and everything....”⁵⁵³

It could be argued that such concern for older teens represents a liberationist view of children’s rights, whereby individuals under the age of majority still may have capacity to make decisions that have long-term effects, such as marriage. However, in looking at the voting records of the above-cited legislators, a concern for children’s liberation generally is not a motivating factor in

⁵⁵⁰ Florida House Judiciary Committee (n 543).

⁵⁵¹ *ibid.*

⁵⁵² Maine House Judiciary Committee, Hearing on LD622, 9 June 2021.

⁵⁵³ Maryland Assembly Judiciary Committee, Hearing on HB83, 27 January 2022.

their policymaking. For example, Representatives Gonzalez⁵⁵⁴ and Plakon⁵⁵⁵ have openly opposed the right of children to access gender-affirming medical care and to access abortion services. Marriage for these legislators as seen as a special circumstance that should be permissible, and perhaps even encouraged, for “older teens”.

Brightline advocates have specifically taken aim at eliminating all marriages under the age of majority, even for older teens. For such policymakers, if a child is under the age of legal majority in the state, she is still entitled to protection against the negative consequences of child marriage. For example, New York raised their minimum child marriage age from 14 to 17 in 2017.⁵⁵⁶ Then, just four years later, another bill eliminated exceptions for even 17-year-olds.⁵⁵⁷ Assemblymember Charles Lavine said of the change, “It was critical to the safety of children, and particularly girls, in New York that we raised the age of consent to marry to 18...This legislation will ensure that that is the case for all of our children by ending the exception for certain 17 year olds.”⁵⁵⁸

For such advocates of the elimination of marriage for all children, even older teens, there is a strong protectionist argument. If the law has, for all other purposes, determined that children must be protected from legal decision-making, marriage should not be excluded from that protection.

Parental consent

The most common exception allowing children to marry is parental consent. In total, 31 states have parental consent exceptions for child marriage.⁵⁵⁹ These provisions allow for the parent or guardian of a minor child to provide consent to the court to issue a marriage license to the minor.

⁵⁵⁴ M Choi, “‘Somebody Needs to Get Fired’: Vicente Gonzalez Blasts Dem Strategy on Abortion, Trans Issues’ *The Texas Tribune* (6 November 2024) <<https://www.texastribune.org/2024/11/26/texas-vicente-gonzalez-congress-democrats-abortion-transgender/>>.

⁵⁵⁵ JM Pederdesen, ‘Transgender Bills on the Move in Florida Legislature’ *Central Florida Public Media* (21 March 2023).

⁵⁵⁶ Human Rights Watch, ‘US: New York Governor Signs Anti-Child Marriage Law’ (20 June 2017) <<https://www.hrw.org/news/2017/06/20/us-new-york-governor-signs-anti-child-marriage-law>>.

⁵⁵⁷ ‘Assembly Passes Legislation to Expand Protections in the Child Marriage Law, Making 18 the Age of Consent to Marry’ (n 532).

⁵⁵⁸ *ibid*.

⁵⁵⁹ Alabama, Alaska, Arizona, Arkansas, California, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, West Virginia, Wisconsin, Wyoming. Statute Compendium A.

In most states with such exceptions, the lowest age for which a parent may consent for a child to marry is 16 or 17, however in Kansas parents can consent to the marriage of a 15-year-old child⁵⁶⁰ and in California there is no minimum age for which a parent can consent to their child's marriage.⁵⁶¹

The commonly cited rationale behind these exceptions is one of paternalism, whereby parents have the best interest of their children at heart and will only consent to marriages that are in their children's best interest. For instance, Oklahoma Representative Randy Randleman argued parents should be able to express a desire for their child's marriage, particularly in the case of pregnancy arguing "If we had a 15-year-old child, the child became pregnant, the parent wanted them to get married, and the kids wanted to get married, this bill would stop that from happening."⁵⁶²

Other opponents of reform argue that parental rights over their children are at risk by elimination allowances for parental consent, or even by requiring judicial approval as an additional safeguard on child marriage. Representative West summarized this argument stating:

Do you see this [bill] as still putting the court slightly above the parents' choice because it says that you have to have both, and the way that it's written and the way that things would ordinarily go through the process, the parent would agree. Then the judge would have the final say for the yes, or they could override the parents' choice by saying no. Do you see where maybe you disagree with this, but do you see where I am coming from that this puts the court slightly above the parents' choice? I also 100% believe it should be the parent's choice when they are 16 or 17. What this bill does with the amendment is it puts the judge above the parent's decision because the first step these kids will go to is their parents.⁵⁶³

Other opposers of child marriage elimination have argued that parental rights over children extend to certain religious practices, including child marriage, and should therefore be protected.

⁵⁶⁰ Kan. Stat. § 23-2505. Statute Compendium A.

⁵⁶¹ Cal. Fam. Code § 301-304. Statute Compendium A.

⁵⁶² Oklahoma House of Representatives, Hearing on HB3873, 11 March 2020.

⁵⁶³ *ibid.*

For example, in his veto of A3091, which would have eliminated then-exceptions for child marriage in New Jersey, Governor Chris Christie stated:

Protecting the well-being, dignity, and freedom of minors is vital, but the severe bar this bill creates is not necessary to address the concerns voiced by the bill's proponents and does not comport with the sensibilities and, in some cases, the religious customs, of the people of this state... An exclusion without exceptions would violate the cultures and traditions of some communities in New Jersey based on religious traditions.⁵⁶⁴

Parental consent exceptions present significant issues in terms of marital consent. Parental consent for a minor to marry operates as a form of vicarious consent, but should such substituted consent be permitted for a contract such as marriage? Proponents of child marriage exceptions, such as those cited above, have argued that parents will act in the best interest in the child when consenting to a marriage. However, opponents question whether a minor marriage can ever be in the best interest of a child. For instance, Rhode Island's Representative Julie A. Casimiro cited research on the long-term negative effects of child marriage stating:

Child marriages destroy girls' health, education and economic opportunities and increase their risk of violence. These young girls risk a 70 to 80 percent chance of divorce and they are more likely to end up in poverty than teen moms who remain single. These marriages can be used to cover up an unwanted pregnancy or cover for abuse.⁵⁶⁵

Representative Casimiro went on to specifically warn that parents could use such exceptions for purposes of exploitation of their children in supporting the state's brightline bill:

Sometimes abusive parents use these marriages for financial gain. Sometimes these marriages are used for sex trafficking purposes. The United Nations has made this a child welfare priority and with this bill's passage, Rhode Island becomes the fifth state in the country to do so, making us a leader in our work protecting children.⁵⁶⁶

⁵⁶⁴ Gov. C Christie, 'Statement on Gubernatorial Veto of HBA3091' (11 May 2017).

⁵⁶⁵ 'Governor McKee Signs Two Bills into Law' (n 526).

⁵⁶⁶ *ibid.*

Concern for parents using parental consent exceptions to force the marriage of children was echoed by Rhode Island Senator John P. Burke:

Between 2013 and 2019, 32 minors — one as young as 14 — were married in Rhode Island, the vast majority of them being girls. And most often, child marriage is forced marriage, with minors being compelled to marry by their parents. It's time for the state to put an end to this outrageous practice.⁵⁶⁷

Judicial approval

The next most common exception allowing for child marriage is judicial approval, which permits a judge (generally a family court or juvenile court judge) to approve the issuance of a marriage license to a minor. These exceptions are rooted in a respect for the discretion of judges and their ability to discern the best interest of children who seek to marry. They are also designed to provide a failsafe measure if the children's parents are seeking to marry the child against the will of the minor.⁵⁶⁸ 15 states require judicial approval for the issuance of a marriage license to a minor (mandatory judicial consent),⁵⁶⁹ and nine additional states allow a judge to stand in for the requisite parental consent if a child's parent or guardian is unavailable (supplementary judicial consent).⁵⁷⁰ In Mississippi and New Mexico, judges can approve marriage licenses for children at any age, regardless of age restrictions that apply to parental consent exceptions.⁵⁷¹

Like parental consent, judicial approval exceptions have faced backlash in recent years. Opponents of these exceptions point to statistics indicating that judges nationwide have repeatedly approved marriages between parties with an age difference that would otherwise qualify as statutory rape.⁵⁷² Furthermore, as discussed in Chapter 1.3, judges have in some instances used their legal power to compel unwanted marriages, particularly in the case of

⁵⁶⁷ *ibid.*

⁵⁶⁸ See Tahirih Justice Center (n 416) ("Requiring all marriage of minors to be approved by a judge, in a process that includes a suite of specific safeguards and ends with a minor becoming emancipated prior to the marriage, can have a particularly meaningful impact on preventing harm, especially in states with high numbers of child marriages.")

⁵⁶⁹ Alaska, Arkansas, Colorado, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Mexico, Ohio, Oregon, Wyoming. Statute Compendium A.

⁵⁷⁰ California, Illinois, Kansas, Maine, Mississippi, North Carolina, Oklahoma, Oregon, Wisconsin. Statute Compendium A.

⁵⁷¹ Miss. Code § 93-1-5; NM Stat. § 40-1-6. Statute Compendium A.

⁵⁷² Van Roost K, Horn M, Koski A, 'Child Marriage or Statutory Rape? A Comparison of Law and Practice Across the United States' 70 Journal of Adolescent Health 58 (2022).

pregnancy.⁵⁷³ Advocates reject that judges should have the power to override the mental capacity restrictions the law has placed on minor children for marriage, as this leaves the judge with considerable discretion that is subject to the judge's own personal ideology about the moral attributes of marriage. New York Speaker of the House Carl Heastie, for instance, urged the decision of child marriage to be removed from judicial discretion stating:

Our children deserve to have a childhood – which is taken away from them when they marry while still actual children... We made huge steps in protecting children, and girls especially, from being forced into marriages in 2017. Today's legislation furthers that, removing a provision that allows 17-year-olds to marry at a judge's discretion.⁵⁷⁴

However, other policymakers have shown resistance to such changes, such as Representative Erin Grall of Florida, who argued that judges should maintain discretion over the marriages of older children stating, "I [have] some concerns about eliminating judicial discretion for individuals, especially under certain circumstances where you have two 17-year-olds who may want to get married."⁵⁷⁵

Romeo and Juliet exceptions

So-called "Romeo and Juliet" clauses are another child marriage exception, though almost always in combination with an additional exception. These provisions, mirroring statutory rape laws going by the same moniker, limit the permissible age gap between the marrying parties when one of the spouses is a minor. In seven states the Romeo and Juliet provision is four years between the minor and an adult spouse,⁵⁷⁶ in Idaho the limit is three years,⁵⁷⁷ in Florida the limit is two years,⁵⁷⁸ and in Missouri a minor cannot marry an individual older than 21, regardless of the child's age.⁵⁷⁹ In all states but Tennessee,⁵⁸⁰ the Romeo and Juliet provision is combined with another exception/exceptions, such as parental consent or judicial approval.

⁵⁷³ Chapter 1.4.

⁵⁷⁴ 'Assembly Passes Legislation to Expand Protections in the Child Marriage Law, Making 18 the Age of Consent to Marry' (n 532).

⁵⁷⁵ Florida House Judiciary Committee Debate (n 543).

⁵⁷⁶ Georgia, Indiana, North Carolina, Ohio, Tennessee, Utah, West Virginia. Statute Compendium A.

⁵⁷⁷ I.C.A.S § 32-202. Statute Compendium A.

⁵⁷⁸ FL Stat. § 741.04. Statute Compendium A.

⁵⁷⁹ MO Rev. Stat. § 451.090. Statute Compendium A.

⁵⁸⁰ Tenn. Code § 36-3-105. Statute Compendium A.

Some policymakers have supported the view that parties close in age, should be permitted to marry, particularly if the child in the marriage is above the age of sexual consent in the state. For instance, Chair Ed Setzler of Georgia asked:

I am sensitive, though, particularly in the provision about the four-year separation in age....so my question is, if you had a, of course, age of consent, isn't it true is 16 here in Georgia for consensual sex? I think none of us here would encourage that, but if there were a relationship between people where there was a 17-year-old and a 21-year-old and the 21-year-old were, instead of being 48 months older...why don't we have a provision to allow parents to allow that to happen in that circumstance?⁵⁸¹

However, for brightline advocates, Romeo and Juliet exceptions do not address the legal separation between children and adults, regardless of age. While certainly the gap in intellectual and emotional maturity between spouses may be less significant when the state limits the permissible age gap between marrying parties, this does not eliminate the differences in legal capacity to contract, as discussed above. Opposers of child marriage have argued that a limitation of the ages of marrying parties does not address the myriad of legal challenges presented by a child's status as an incapacitated minor.⁵⁸²

Emancipation

Emancipation, in principle, allows for a court to remove many of the legal incapacities of minors so they are free to participate in most aspects of civil society. However, emancipation is a highly contested legal principle that varies greatly amongst state jurisdictions.⁵⁸³ 41 states allow for the emancipation of a child by court order.⁵⁸⁴ In general, courts will only issue such an order in extreme circumstances, where the child has demonstrated a significant level of financial and

⁵⁸¹ Georgia House of Representatives Debate (n 546).

⁵⁸² See eg. Reiss (n 353); Tahirih Justice Center (n 541).

⁵⁸³ See generally Social Security Administration, 'State Emancipation Law Survey Results' <https://secure.ssa.gov/apps10/public/pomsimages.nsf/gfx_num/G-GN_00502.085C1/%24File/G-GN_00502.085C1.pdf>.

⁵⁸⁴ Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. Statute Compendium C.

domestic independence and has a serious reason for seeking legal separation from her parents.⁵⁸⁵ Further, most court-ordered emancipation does not automatically confer all of the benefits of legal adulthood. For example, in many jurisdictions an emancipated minor cannot subvert child-labor restrictions, and they are still subject to age restrictions on such activities as drinking, driving, etc.⁵⁸⁶ However, there is a uniform acceptance that the obligation for parental support terminates upon a child's emancipation.⁵⁸⁷

A survey of state law indicates that emancipation does not automatically confer the ability for a child to enter the contract of marriage. Six states provide provisions which specifically enumerate emancipation as an exception to child marriage age restrictions.⁵⁸⁸ The silence in other states statutes indicates that emancipation is not sufficient to allow a child to marry. Further, the example of the recent legislative changes in Virginia provide insight into this matter. In 2018, Virginia narrowed its existing marriage age law to permit only emancipated minors to marry below the age of 18.⁵⁸⁹ In 2024, the legislature updated this rule to prohibit even emancipated minors from marrying under 18.⁵⁹⁰ It is therefore concluded that without a specific exception, most states will not permit the marriage of an emancipated minor.

Laws Related to Child Marriage

Beyond marriage-age laws, the practice of child marriage across the US has ramification on several other areas of legislation. When states permit children to marry, such marriages can come into direct conflict with other state laws on legal capacity and sexual consent.

Auto-emancipation based on marriage

While, as stated above, emancipation does little to allow a child to consent to marriage, if a child is permitted to marry under another exception, the vast majority of states automatically emancipate that child. In total, 32 states automatically emancipate minors upon marriage.⁵⁹¹ In

⁵⁸⁵ See generally Social Security Administration (n 583).

⁵⁸⁶ *ibid.*

⁵⁸⁷ *ibid.*

⁵⁸⁸ Arizona, Georgia, Indiana, New Mexico, North Carolina, Texas. Statute Compendium A.

⁵⁸⁹ 'Virginia Makes History as 12th State and First in the South to End Child Marriage' (Tahirih Justice Center 2024) <<https://www.tahirih.org/news/virginia-makes-history-as-12th-state-and-first-in-the-south-to-end-child-marriage/>>.

⁵⁹⁰ See Khalil J, 'Virginia lawmakers have voted to raise the marriage age to 18. Most states haven't', NPR (4 April 2024).

⁵⁹¹ Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico,

addition, while Alabama does not fully automatically emancipate children upon marriage, the state allows them to initiate legal actions in family court in their own names if married.⁵⁹² There are two potential theories behind automatic marriage emancipation. The first is based in a solid rationale that the removal of legal incapacity of a married child allows the child to seek a divorce. Without emancipation, a child could be legally married but could not initiate their own divorce suit. It is indeed the case that in Alaska, Colorado, Illinois, Montana, and Oklahoma children can marry but are under the age to bring a legal suit in their own name and are not automatically emancipated by marriage,⁵⁹³ so the child would, in principle, lack legal capacity to bring a divorce case for herself.⁵⁹⁴ To allow a child to marry, while continuing to deny them the ability to independently seek divorce, is highly illogical and could essentially trap the child in an unwanted marriage.

The possible second justification for automatic emancipation, however, is rooted in less stable reasoning. While the ordinary granting of emancipation requires an extensive showing that a child has the requisite financial, educational, and intellectual capacity to support herself without her parents⁵⁹⁵ the marriage of a child, and subsequent automatic emancipation, requires no such findings. A child can still be entirely dependent on her parents, but as soon as those parents consent to the child's marriage, the parents relieve themselves of all financial responsibility towards the child. This creates an obvious incentive for parents to consent to the marriage of a child, or in some cases even force a marriage, as it is one of the only ways that parents can relieve themselves of support obligations towards their child. If the child, who again has not been required to show any level of independence, requires financial or other support, neither her parents nor state child services will be obligated to supply this assistance.

As discussed throughout this thesis, there is a general sentiment that if a child is married, they have some level of greater maturity than an ordinary child, or at least their spouse will serve as a new guardian in lieu of the child's parents. Presumably, legislators assume that such children will be supported by their spouses (as again 85% of children married in the US are minor girls to adult

North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, Wyoming. Statute Compendium C.

⁵⁹² AL Code § 26-13-1; § 30-02-6. Statute Compendium C.

⁵⁹³ Statute Compendium C.

⁵⁹⁴ However, as discussed above it is unclear in practice if the court would permit such an independent action as children's capacity to bring legal suits is not a clearly defined issue in state courts.

⁵⁹⁵ Social Security Administration (n 583).

men.)⁵⁹⁶ This can create a staggering inequity in such marriages, where the child has no choice but to remain with her spouse, even in cases of abuse, as she cannot receive support from other sources. Furthermore, emancipated status is generally permanent: minority is not reinstituted if a child divorces.⁵⁹⁷ So, for example, if a child does leave an abusive spouse, her parents do not resume financial responsibility for her, nor can she seek protection by state child protection services, as she is legally no longer a child. Automatic emancipation deems married children to have a greater level of capacity and independence than non-married children without any factual or data-driven justification, which could have disastrous consequences.

Marital exceptions to rape on the basis of age

Questions surrounding the consent of children to marry become even more perplexing when we observe the relationship between minor marriage exceptions and statutory rape laws. 36 states have explicit exceptions allowing for sex between married couples that would otherwise constitute statutory rape.⁵⁹⁸ Of these states, nine have eliminated all exceptions to marriage under the age of 18, so the exception is rendered irrelevant unless the parties are married in another state.⁵⁹⁹ For the remaining states, marital exceptions to statutory rape provisions are widely utilized. From 2000-2020, an estimated 31,389 marriages that would have fallen under the state's statutory rape law were made legally permissible by a marriage exception.⁶⁰⁰

Even more concerning, Illinois and Wisconsin do not have a marital statutory rape exception but allow children under the age of sexual consent to marry.⁶⁰¹ This means that in such a marriage in these states, every sexual act between the spouses is technically a violation of sexual assault laws, yet the marriage itself has been licensed by the state. While perhaps this disconnect could be put down to legislative ignorance of such laws, these provisions are not simply “on the

⁵⁹⁶ Unchained At Last (n 16).

⁵⁹⁷ One notable exception to this general principle is Colorado, which reinstates parental child support upon a child's divorce. C.R.S. 14-10-115(13)(a)(IV).

⁵⁹⁸ Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin. Statute Compendium A. Statute Compendium D.

⁵⁹⁹ Delaware, Maine, Michigan, Minnesota, Missouri, New York, Vermont, Virginia, Washington. Statute Compendium A.

⁶⁰⁰ Van Roost, Horn and Koski (n 218) at 75.

⁶⁰¹ See Statute Compendiums A and D.

books”: from 2000-2020, an estimated 8227 marriages took place with partners whose age difference constituted statutory rape under the state’s current law.⁶⁰²

Concern for these statutory rape provisions has proved a motivating factor in raising marriage age for lawmakers. For instance, Senator Anthony Delcollo of Delaware said of the state’s brightline law:

The other thing this [law] does, which was a really moving aspect for me, was close what I view as an unacceptable loophole in our criminal law, whereby a person could marry a minor aged 16 or 17 and thus create an exception to what otherwise would be considered statutory rape. So, we ended what is an awful and unacceptable practice...⁶⁰³

Infancy annulment

Where a minor has married and seeks termination of the marriage, they may seek an annulment, under certain conditions, in most jurisdictions. In total, 30 states have specific statutory language on the annulment of the marriage of a minor.⁶⁰⁴ The statutory language varies significantly across these states. In addition, five states do not have such a statute, but courts have accepted infancy as grounds to void a marriage.⁶⁰⁵ Four states use brightline language that allows for termination if one of the spouses was under the age of 18 at the time of marriage.⁶⁰⁶ This is largely consistent with the statutory framework of these states, as New Jersey, New York, and Virginia have all recently prohibited all marriage under 18 without exceptions.⁶⁰⁷ Similarly, Hawaii, Illinois, Vermont, and Wyoming set a definitive age cut-off for nullity based on infancy which corresponds to their legal age of marriage.⁶⁰⁸

⁶⁰² Van Roost, Horn and Koski (n 218) at 75.

⁶⁰³ Z Read, ‘In Ceremonial Signing, Gov. Carney Renews Delaware’s Vow against Child Marriages’ *WHYY: NPR* (21 June 2018) <<https://whyy.org/articles/in-ceremonial-signing-gov-carney-renews-delawares-vow-against-child-marriages/>>.

⁶⁰⁴ Arkansas, California Hawaii, Indiana, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New York, Ohio, Oregon, Virginia, Vermont, Washington, West Virginia, Wisconsin, Wyoming, Alaska, California, Colorado, Delaware, Florida, Idaho, Illinois, Montana, North Dakota, Pennsylvania, South Dakota, Texas. Statute Compendium B.

⁶⁰⁵ Alabama, Missouri, New Hampshire (only without parental consent), Rhode Island, Tennessee. Statute Compendium B

⁶⁰⁶ New Jersey, New York, Ohio, and Virginia. Statute Compendium B

⁶⁰⁷ NJ Rev. Stat. § 37:1-6; NY Dom. Rel. Code Art. 3, § 15-a; VA Code § 20-48. Statute Compendium A.

⁶⁰⁸ Statute Compendium B.

However, many states that allow for annulment on the ground of infancy only permit the termination if the parent/guardian did not consent to the marriage and will not permit termination if the parties cohabitated for any period after the child reached the age of majority.⁶⁰⁹ These conditions in most statutes indicate that legislatures generally do not view infancy alone as a justification to void a marriage; rather it is lack of proper procedure (for example, obtaining parental approval) that voids the marriage. Furthermore, the unavailability of annulment for parties that have cohabitated seemingly reflects several long-held concerns of legislators related to marriage. While little legislative history exists to indicate the specific reasoning for the continued inclusion of cohabitation exceptions in annulment, it is possible that these exceptions are aimed at preserving the “sanctity” of a female child who has already engaged in sexual intercourse with her spouse. As evidenced by the discussion of traditional views of sexual purity in Chapter 1.3, courts have shown little concern for the actual will of the parties to be married once it is shown that a girl has lost her “chastity.” This is demonstrated in antiquated cases such as *Herrman v. Herrman*, where the court concluded that even if a marriage should have been invalidated due to the age of one of the spouses it would be upheld because the parties had consummated the marriage.⁶¹⁰ State lawmakers may be unwilling to annul marriages, even when one or both parties lacked proper consent to enter the marriage, where the parties have lived together because there is an assumption that they have had sexual relations and therefore should remain married.

In several states, the language of infancy annulment is considerably opaque. Nebraska and West Virginia, for instance, allow for the voiding of marriage where one of the parties was under the age of “consent”, but do not specify if this term refers to the age of contractual consent or sexual consent.⁶¹¹ Five states use the language of capacity to consent in relation to age, finding that where a person cannot consent for “want of age”, the marriage may be voided.⁶¹² Presumably, this would allow only children under the minimum age for marriage established by other state laws to seek annulment, but this is not entirely clear in the statutory language. It is possible a child over the age of legal marriage, but under the age to legally contract (generally 18) could

⁶⁰⁹ Alaska, Idaho, Michigan, Minnesota, Nebraska, North Dakota, Ohio, South Dakota, Wyoming. South Carolina does not have a specific statutory provision for annulment due to minority, but other statutory provisions do allow for annulment if the parties have not cohabitated. Statute Compendium B.

⁶¹⁰ *Herrman v. Herrman* (1916) 93 Misc 315 (New York).

⁶¹¹ Neb. Rev. Stat. § 42-118; WV Code §48-3-103.

⁶¹² Arkansas, Indiana, Michigan, Oregon, and Wisconsin. Statute Compendium B

seek an annulment based on these provisions. In an additional six states, the language is even more vague. For instance, in Arizona, courts may void a marriage wherever “the cause alleged constitutes an impediment rendering the marriage void”⁶¹³ and in Kansas a court has discretion to annul the union if it is “void for any reason.”⁶¹⁴ In Connecticut, “a marriage is voidable when there is a lack of mutual consent.”⁶¹⁵ In Georgia, “mental incapacity” of one of the spouses can provide grounds for annulment, but this incapacity is not defined, and could potentially include infancy. Likewise in Louisiana, “[a] marriage is relatively null when the consent of one of the parties to marry is not freely given...”, however the factors that influence the “free” giving of consent are not specified.⁶¹⁶ Finally, in Nevada, a marriage is void “when either of the parties to a marriage for want of understanding shall be incapable of assenting thereto”,⁶¹⁷ but here again the factors that leave a party with a “want of understanding” are not enumerated and may include infancy.

As evidenced by this statutory assessment, the legislative landscape of child marriage across this US is riddled with inconsistencies, contradiction, and confusion. Tensions over such laws in recent years has led to a meteoric rise in debate over ending child marriage throughout the US, with advocates passionately arguing on both sides of the debate.

Conclusions

Having assessed the legislative landscape surrounding child marriage across the US, we can reflect on what this debate tells us about the American understanding of marital capacity. We can conclude that children are deemed, in most circumstances, to lack the same mental capacity to give valid consent to marry as adults. These restrictions on child marriage arise from a protectionist view of children’s rights, where adults restrict children from consenting to marriage to protect them from current harm and safeguard their future interests. These restrictions create an overriding presumption that an external expression of consent from a child to marriage, on its own, is insufficient to create valid marital consent. Indeed, in no jurisdiction is the child’s consent alone sufficient to award a marriage license to a minor.⁶¹⁸

⁶¹³ A.R.S § 25-301. Statute Compendium B

⁶¹⁴ Kan. Stat. § 23-2702. Statute Compendium B

⁶¹⁵ C.G.S. § 46b-40. Statute Compendium B

⁶¹⁶ LA Title IV Chapter 2 Art 95. Statute Compendium B

⁶¹⁷ Nev. Rev. Stat. § 125.330. Statute Compendium B

⁶¹⁸ See Statute Compendium A.

However, it is also clear that until very recently, apprehensions over the validity of children's consent were widely trumped by other social concerns. While the Consent Doctrine discussed in Chapter 1.3 hypothetically places the valid consent of the marrying parties at the center of determining the legitimacy of any marriage, the legal reality does not always prioritize this consent for children. Particularly in cases of pregnancy, the arguments against minor's valid marital consent are often put aside. Proponents of allowing child marriage do not however root their arguments in children's liberationist ideas, where children are endowed with marital consent capacity as independent rights bearers. Rather, these supporters largely seek to keep in place a system of vicarious consent by parents and judges on behalf of minor children.

The result of this conflict is a quagmire of marital and children's rights laws across jurisdictions muddled with theoretical and practical contradictions. Take for example the infancy annulment rules that, while in line with general contract law, are at odds with the other laws regarding married minors, particularly the rules governing emancipation. Under contract law theory, children cannot give valid consent to contract, so they must be protected from their contracts through the option of voidability. However, since the majority of jurisdictions automatically emancipate children upon marriage, thereby endowing a married child with the same legal capacity as an adult, has the child not reached the age of majority immediately upon marriage, and therefore obtained contract capacity? Her legal status as a child has ended, yet she is still considered a child for purposes of contract invalidation until the age that an unemancipated child would reach majority.

The principle of automatic emancipation of married children itself runs contrary to the foundational principles of emancipation. Ordinarily, children seeking emancipation must demonstrate a high threshold of capacity and responsibility, including the ability to financially support themselves. However, no such assessment of capacity is required for married children. The assumption that married children are independent or otherwise cared for is just that: an assumption. Further, in practicing jurisdictions, auto-emancipation by marriage is not optional; a child cannot voluntarily maintain minor status once married. The parents of a child emancipated by marriage are immediately relieved of their parental support obligation, regardless of the child's actual financial means. Furthermore, emancipation is generally a permanent adjustment in

status, meaning that even if the child divorces, she cannot regain a minor dependent status and cannot enforce support obligations against her parents or avail of the child support services of the state.

Perhaps the most perplexing contradiction created in the law through the allowance of child marriage is a married minor's ability to consent to sex. The idea that another can vicariously consent to sex on behalf of a party of limited capacity runs contrary to every modern notion of sexual autonomy. Outside of marriage, neither a parent nor judge can consent to a child engaging in sex under a state's statutory age requirements. Yet somehow this basic premise is upended in the case of marriage: a parent or judge can consent to the marriage of a child, an exception to statutory rape for spouses will kick in, and suddenly sex with the minor is legally permissible. The child's mental capacity to consent to sex has not changed, but in this way an adult can vicariously consent to sex for the child.

How can parents or judges be acting in a child's best interest when entering a minor into a marriage where every act of sexual intercourse would otherwise constitute rape under the state law? From a legal perspective, there is no adequate reasoning for this allowance. The answer comes from the historical underpinnings of statutory rape law that are discussed in Chapter 1.3. As discussed at length in that chapter, the legislative intent behind statutory rape laws is rooted more firmly in lawmakers' desire to preserve a child's "chastity" before marriage and to shield the State from welfare claims by unwed mothers than to protect minors from unconsented-to sexual intercourse. Through this lens, we can see why states have been lenient in allowing parents to consent to the marriage of their children into otherwise illegal sexual unions.

Another complicated question arises when we view the current patchwork of child marriage laws in light of potential constitutional challenge. As discussed, 14th Amendment rights have been determined to apply to children, and the limited case law related to children's constitutional protections has generally expanded, rather than restricted, their due process rights.⁶¹⁹ However, the Court has not explicitly addressed age under the right to marry. As rights holders under the 14th Amendment, it is possible that a child could assert that the right should apply regardless of

⁶¹⁹ See *eg. In re Gault* (n 485).

age. For purposes of this analysis, let us presume such a challenge; we must then determine if a state can permissibly infringe on such a right.

If the right to marry, as a fundamental due process right, is subjected to strict scrutiny analysis, the government will be required to show that any regulation restricting the right is “narrowly tailored” to suit a “compelling government interest.”⁶²⁰ A state may argue that restraints on the ability of children to marry, whether they be restrictions such as parental or judicial approval or a blanket ban on all underage marriages, is driven by an interest in protecting children from the unintended consequences of marriage. This interest would likely be persuasive to the Court, as Justices have found a state’s interest in protecting children as compelling. For instance, in *Sable Communications v. FCC*, the Court stated, “We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”⁶²¹ With this precedent, states should be able to quite easily show a compelling interest at the root of their marriage-age restrictions.

However, states may face more difficulty in showing that these restrictions are narrowly tailored to that protective interest. The state would have to show that whatever restriction it applies is necessary and the “least restrictive” method of ensuring the protection of children. For each different type of regulation, the state would likely be required to show significant evidence that such a restriction on the child’s right to marry serves as a significant protective measure. As discussed throughout this chapter, these arguments are often complicated significantly by individual and societal views of marriage and little objective evidence exists on the effectiveness of any child marriage restrictions in protecting children from negative outcomes within marriage. The 16 states that have implemented blanket prohibitions on all marriages for children under 18, regardless of individual circumstance, will perhaps struggle the most to show that these laws are narrowly tailored to the state’s compelling interest in protecting children. Children who can show advanced capacity, either through emancipation or other indicators, may have a strong argument that the law’s blanket prohibition on marriage of minors is not the least restrictive regulation and therefore does not meet strict scrutiny.

⁶²⁰ See discussion of strict scrutiny in Chapter 1.4.

⁶²¹ *Sable Communications v. FCC* (n 255); see also *Denver Area Education Telecommunications Consortium Inc v FCC* (1996) 517 US 727, 755 (US Supreme Court) (“We agree with the Government that protecting children is a ‘compelling interest’”).

However, as discussed in Chapter 1.4, the Court has never actually applied the specific language of strict scrutiny to the right to marry, and the most definitive language used by the court comes from *Zablocki*, which requires that a regulation on marriage be “closely related” to an “important” government interest.⁶²² If we apply *Zablocki*’s arguably lower scrutiny threshold to the restrictions on the right of children to marry, it is perhaps more likely that state restrictions will be found constitutionally permissible. The interest in protecting children from potential negative outcomes of marriage would certainly seem to be “important” by the Court’s prior holdings and require a less definitive showing of evidence from states of these outcomes. Further, if the state can demonstrate this important interest, a variety of restrictions on child marriage could be interpreted as “closely related” to such an interest. It is still questionable however if a blanket ban on marriages under 18 would meet even the “closely related” standard.

In contrast to a due process assessment, an equal protection analysis of child marriage restrictions would significantly decrease the burden on states. The Court has controversially ruled that laws that discriminate on the basis of both age⁶²³ and mental disability⁶²⁴ are subject only to rational basis scrutiny. This requires a showing of a mere “legitimate government interest” and a “rational relationship” between that interest at the government regulation.⁶²⁵ If we accept that states’ predominant justification for age and capacity restrictions on marriage is a protective concern for the wellbeing of children, that concern can likely form the basis for a legitimate government interest. Furthermore, if that interest is considered legitimate, certainly restricting the entrance of such parties into marriages that might open them to financial and sexual relations that are potentially beyond their capacity to fully understand is rationally related to that interest. From this perspective, marital restrictions on children will likely pass rational basis equal protection analysis.

Despite how confounding the statutory inconsistencies and potential legal challenges created by child marriage exceptions may be, it is clear from an assessment of legislative concerns that personal and moral objections are often more convincing to policymakers than an overriding

⁶²² See discussion of the *Zablocki* test in Chapter 1.4.

⁶²³ *Gregory v Ashcroft* (1991) 501 US 452 (US Supreme Court).

⁶²⁴ *City of Cleburne v Cleburne Living Ctr* (1985) 473 US 432 (US Supreme Court).

⁶²⁵ See discussion of rational basis review in Chapter 1.4

objective for regulatory uniformity. In the cases of pregnant and older children, some legislators would prefer to leave avenues to marriage open, regardless of the resulting legal incongruences or concerns over child marital consent capacity. However, the tide may finally be turning on the child marriage debate based on recent legislative advancements. With 16 states prohibiting all minor marriages in just the past six years, and dozens of similar laws being introduced across the US every term, the coming years may see a massive shift in the nature of child marriage in America.

2.2 Persons with Mental Disabilities

We turn now to another area where the capacity of an individual to consent to marriage comes under question: marital restrictions for persons with mental disabilities. While the discussion of children dealt with an easily identifiable social group (individuals under the age of majority), it is much more difficult to fully encompass the wide range of conditions that may lead to mental disability. Mental disability can include a wide variety of intellectual, cognitive, and developmental factors, and is broadly defined under the Americans with Disabilities Act as a “mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of impairment; or being regarded as having such an impairment.”⁶²⁶ To address this broad spectrum of abilities, modern disability activists argue against a medical categorization of disability in favor of a social categorization.⁶²⁷ From this view, disability is not defined as a departure from an ideal mental state, but rather a “social condition brought about by social norms, practices, and beliefs” around specific abilities.⁶²⁸ For this reason, this thesis will not attempt to provide a psychological assessment of mental disability, nor a unified definition of what constitutes mental disability or incapacity. Instead, it will attempt to summarize the legal discourse surrounding the marriage rights of those *deemed* “mentally disabled.”

The extent to which a mental impairment may impede one’s ability to understand consent, for marriage or otherwise, is highly subjective and would vary greatly from person to person. Perhaps because states have attempted to address mental disability and marital consent so generally, the result is an extraordinarily broad and ill-defined landscape of legislation. As with other areas of marital consent examined in this thesis, little research has been dedicated specifically to this question. This chapter therefore starts with an examination of the historical progress of the consent rights of persons with mental disabilities and an evaluation of the modern laws governing the rights of persons with mental disabilities to give consent to contracts generally. It then turns to an evaluation of the right of persons with mental disabilities to marry under state law and the corresponding annulment laws allowing for the dissolution of marriage based on mental disability. Unlike with the marriage of children, which has been surrounded with

⁶²⁶ Americans with Disabilities Act 1994, 42 U.S.C. 12102.

⁶²⁷ See eg. N Hirschmann and B Linker (eds), *Civil Disabilities: Citizenship, Membership, and Belonging* (University of Pennsylvania Press 2015).

⁶²⁸ *ibid* at 4.

significant discourse in the past decade, little legislative change has been proposed related to the ability of persons with mental disability to marry, and therefore less legislative history is available for evaluation. However, there has been some recent legislative reform on legal exceptions for married couples under the ordinary sexual assault laws related to mental disability. In addition, there has been some modern debate on the marriage of persons with disabilities and the subsequent termination of state benefits. As with states that automatically emancipate children upon marriage, so too does marriage eliminate dependent status from persons with disabilities for purposes of welfare benefits, a controversial issue that many argue significantly impacts the ability of these individuals from freely entering a marriage. This chapter examines the proposed legislative changes to marital rape and benefit law in relation to the marriage of persons with mental disabilities and attempts to situate these debates within the broader context of marital consent.

Throughout this chapter, there will be multiple parallels drawn between the laws on child marriage and the laws on the marriage of persons with disabilities. This structure is designed to reflect current marriage laws throughout the US. As discussed in the Introduction, marriage capacity restrictions fall into three main categories: age, disability, and intoxication. As age and disability are grouped together by state legislation, we must assess these restrictions side-by-side to ascertain how lawmakers conceptualize the boundaries of marital consent. It is critical to note, however, that by drawing these parallels, this thesis does not seek to infantilize or otherwise draw a literal comparison between persons with mental disabilities and children.

Background on Disability Rights and Decision-Making Capacity

For much of Western legal history, particularly under the English common law and American colonial systems, mental disability has been painted with a broad, crude brush. Those deemed to suffer from “idiocy or lunacy” were considered social outcasts, to be denied the same rights of other adults and restricted from general society as much as possible.⁶²⁹ Determination of mental disability for much of early American history had little scientific basis or nuance, with any assortment of mental conditions being cast under the blanket of “insanity.”⁶³⁰ Puritanical

⁶²⁹ S Brakel, J Parry and BA Weiner, ‘The Mentally Disabled and the Law’ [1985] American Ba Foundation at 10-11; *see also* P Wickham, ‘Conceptions of Idiocy in Colonial Massachusetts’ (2002) 25 J Soc Hist 935.

⁶³⁰ J Matloff, ‘Idiocy, Lunacy, and Matrimony Exploring Constitutional Challenges to State Restrictions on Marriages with Persons with Mental Disabilities’ (2009) 17 Am U J Gender Soc Pol’y & L 497 at 499-500.

attempts to create resources for mental disability, such as asylums, were often made less in an effort to aid persons with a disabilities than to isolate them from the rest of society.⁶³¹ Decisions on what cases were appropriate for asylum treatment were left almost entirely to the discretion of the families of persons with disabilities and the superintendents of such facilities.⁶³²

The legal rights of persons with mental disabilities to marry were nearly non-existent throughout much of early American history, as all decisions for and about such persons were deemed to fall under the responsibility of their families or the state.⁶³³ Just as children were traditionally seen as the property of their parents, so too were persons with mental disabilities seen as essentially “belonging” entirely to their family and caretakers, with no level of individual autonomy. Indeed, independent legal status of persons with mental disabilities was not recognized by the courts until the 19th century.⁶³⁴ When the law did evolve to address the legal rights of persons with disabilities to marry, it was not at first in an effort to protect or empower such individuals. Rather, laws related to mental disability throughout the 19th and early 20th century were based firmly in eugenics and aimed at limiting the procreative rights of persons with disabilities.⁶³⁵

Legislators, based on assumptions of little scientific fact, concluded that the risk of mental disability being passed genetically warranted extreme limitations on marriage rights. The first of these laws, in Connecticut in 1895, restricted marriage on the basis of mental impairment only for women of child-bearing years, a clear indication of a eugenics motivation rather than a consideration of the consent capacity of the persons with disabilities.⁶³⁶

Subsequently, over 30 states passed eugenics-motivated sterilization laws throughout the early 20th century, leading to roughly 60,000 individuals being sterilized on the basis of “mental deficiency”.⁶³⁷ The Supreme Court’s decision in *Buck v. Bell* officially upheld this practice, finding that states’ forced sterilization of persons with mental disabilities did not violate due process, as “imbeciles” represented a class that posed a threat to the health of the state and gave

⁶³¹ See D Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Routledge 2002); see also Brakel, Parry and Weiner (n 629) at 12.

⁶³² See eg. Rothman (n 631).

⁶³³ See eg. Temple Institute on Disabilities (n 461); Anti-Defamation League (n 461).

⁶³⁴ See J Harris, ‘Sexual Consent and Disability’ (2018) 93 New York University Law Review 480 at 506.

⁶³⁵ See eg Matloff (n 630).

⁶³⁶ See ‘Since You Asked: 1895 Marriage Law Aimed at People with Mental Disabilities’ *Hartford Courant* (27 February 2008); see also Matloff (n 630) at 501.

⁶³⁷ Harris (n 634) at 511.

legislatures the right to restrict their bodily autonomy.⁶³⁸ In his now notorious majority opinion in *Buck*, Justice Holmes stated, “it is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”⁶³⁹

As a response to the extreme discrimination of eugenics proponents such as Holmes, advocates in the Civil Rights era in the mid 20th century pushed for greater recognition and protection of the rights of persons with mental disabilities. Activist groups made inroads throughout the 1940s to 1960s in the recognition of persons with mental disabilities as rights holders and argued for widespread “deinstitutionalization”.⁶⁴⁰ These efforts led to subsequent presidential assistance, with President Truman establishing the National Institute of Mental Health in 1948 and President Kennedy dedicating resources for committees on the treatment of mental disability in the 1960s.⁶⁴¹ With this groundswell of support, Congress began to enact legislative protections for persons with mental disabilities, including the Education of All Handicapped Children Act in 1975, which guaranteed access to public school for all children, regardless of disability.⁶⁴²

A large variety of other acts were introduced in the latter half of the century, leading to the historic passage of the Americans With Disabilities Act (ADA) in 1990, the most comprehensive legislation to date on the rights of persons with physical and mental disabilities across the US.⁶⁴³ The ADA prohibits discrimination against persons with disabilities in employment, state services, public transit, telecommunications, and in businesses that are open to the public.⁶⁴⁴ It also requires that employers and service providers extend reasonable accommodation to prevent discrimination against persons with disabilities.⁶⁴⁵

Despite this progress, the application of rights and protections for persons with mental disabilities is often unclear at the level of state practice. As with the examination of children’s marital

⁶³⁸ *Buck v Bell* (1927) 272 US 200 (US Supreme Court).

⁶³⁹ *ibid.*

⁶⁴⁰ A Linder, ‘Capacity to Consent to Sexual Activity Among Those with Developmental Disabilities’ [2018] Stanford Intellectual and Development Disabilities Law and Policy Project.

⁶⁴¹ *See* Matloff (n 630).

⁶⁴² *See* EAHCA, Public Law (PL) 94-142.

⁶⁴³ *See* 42 U.S.C. § 12101.

⁶⁴⁴ *ibid.*

⁶⁴⁵ *ibid.*

consent, it is instructive to look at the ability of persons with mental disabilities to give consent to contract. The doctrine of contractual mental incapacity is deeply embedded in Western legal tradition: It is well established that a court may find a contract unenforceable if one of the parties lacked the mental capacity to understand the nature of the transaction.⁶⁴⁶ Mental incapacity for purposes of contract invalidation can arise either cognitively, where a party lacks the ability to understand the nature of the transaction,⁶⁴⁷ or volitionally, where a party cannot control her actions in adherence with the contract.⁶⁴⁸ The history of the doctrine is outlined in the case *Farmers Bank Trust Co. v. Public Service Co. of Indiana*, where the court states “a person *non compos mentis* ordinarily does not possess mental capacity to make a contract” and traces the roots of the mental incapacity defense back to 1300s English legal tradition.⁶⁴⁹ Where the ‘meeting of the minds’ is an indispensable element of contract formation, the inability of a party to fully understand her contract obligations would logically create a complete defense to formation.

However, the court in *Farmers* also notes a growing criticism of the mental incapacity doctrine, and argues that “contracts entered into with an insane person, in good faith, without fraud or imposition, for a fair consideration, without notice of mental infirmity, before an adjudication of insanity, and executed in whole or in part, will not be set aside...”⁶⁵⁰ The court recognizes that mental impairment is not an “all or nothing” decision; there is a spectrum of understanding that may arise from mental impairment, and courts should endeavor to understand the actual nature of the consent of the parties before automatically declaring such a contract void.⁶⁵¹

While the court in *Farmers* moved away from the mental incapacity doctrine primarily to protect parties that contracted with persons with mental disabilities, some modern legal scholars also argue for the limitation of the doctrine in an effort to uphold the contract rights of members of the

⁶⁴⁶ See eg. S Scott, ‘Contractual Incapacity and the Americans With Disabilities Act’ (2020) 124 Dickinson L Rev. 253.

⁶⁴⁷ See eg *McElroy v Matthews* (1953) 263 SW2d 1 (Missouri); see also *Sparrow v Demonico* (2012) 960 NE2d 296 (Massachusetts); *Brown v United Mo Bank* (1996) F3d 382 (8th Circuit);

⁶⁴⁸ See eg *Blatt v Manhattan Medical Group* (1987) 519 NYS2d 973 (New York Appellate Division); see also *Ortelere v Teacher’s Retirement Board* (1969) 25 NY 2d 196 (New York Court of Appeals); see also Scott (n 646) at 263.

⁶⁴⁹ *Farmers Bank Trust Co v Public Service Co of Indiana* (1936) 13 F Supp 548 (US District Court for the Western District of Kentucky).

⁶⁵⁰ *ibid.*

⁶⁵¹ *ibid.*

disabled community themselves. The concept of “dignity of risk”, championed by Perske, asserts that persons with mental disabilities should be able to enter into contracts, even if they are subsequently against their interest, in the name of personal autonomy.⁶⁵² This expanded right to contract for persons with mental disabilities has been promoted by other advocates, such as the National Council on Disability.⁶⁵³ Scott expands on this approach by hypothesizing that an automatic voiding of contracts made by persons with mental disabilities can often directly conflict with the provisions of the ADA, particularly Title III.⁶⁵⁴ Title III prohibits public, and some categories of private, actors from discrimination on the basis of mental disability.⁶⁵⁵ However, if the doctrine of contractual mental incapacity is strictly adhered to, parties would naturally have to avoid contracts with persons with mental disabilities, in direct contradiction with the anti-discrimination policies of Title III.⁶⁵⁶

Currently, courts remain somewhat divided on the application of the doctrine of contractual mental incapacity, and as we shall see in the next section, this confusion is reflected in the state family law legislation on marriage contracts.

Current law on Marital Consent and Mental Disability

State courts have struggled to clearly define mental disability, particularly in the context of marriage.⁶⁵⁷ As we shall see, eugenics-era restrictions on the rights of persons with mental disabilities have largely been replaced with restrictions that are aimed at ensuring that at the time of marriage, both parties have the mental capacity to understand their consent to the marriage contract. However, the marriage capacity of persons with mental disabilities is not always clearly defined or logically articulated. For example, in a 2013 California appellate case, the court stated that “mental capacity can be measured on a sliding scale, with marital capacity requiring the least amount of capacity, followed by testamentary capacity, and on the high end of the scale is the

⁶⁵² R Perske, ‘Dignity of Risk and the Mentally Retarded’ (1972) 10 Mental Retardation 1.

⁶⁵³ National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* (2018) at 47; see also S Bagenstos, *Law and the Contradictions of the Disability Rights Movement* (Yale University Press 2009) at 90-94; G DeJong, ‘Defining and Implementing the Independent Living Concept’, *Independent Living for Physically Disabled People* (iUniverse 2001) at 4; I Zola, ‘Toward Independent Living: Goals and Dilemmas’, *Independent Living for Physically Disabled People* (iUniverse 2001) at 344.

⁶⁵⁴ See Scott (n 646) at 257.

⁶⁵⁵ 42 U.S.C. § 12101, Tit. III.

⁶⁵⁶ See Scott (n 646)..

⁶⁵⁷ See eg Matloff (n 630) at 503.

mental capacity to enter contracts.”⁶⁵⁸ The court prioritized what it considered to be monetary issues at a higher level of capacity concern, despite the obvious lifelong financial implications of marriage.

This muddled reasoning is evident across the statutory law relating to the marital consent of persons with mental disabilities, which is disjointed and inconsistent across states. Even within state jurisdictions, overlapping (and often antiquated) legislation makes it difficult to ascertain the exact conditions under which parties seeking to marry can be deemed mentally disabled, when mental disability is sufficient to deny a marriage license, or if mental disability is adequate grounds to subsequently annul a marriage. These regulations are often paired with limitations on the marriage of an intoxicated party, which shows a concern for the ability of the party to give valid consent, but without a nuanced evaluation of the complexities of mental disability. Nevertheless, an assessment has been made of the available state family law and has uncovered the following patterns in relation to the marital consent of persons with mental disabilities.

Denial of marriage license

A minority of states prevent in some way the issuance of a marriage license to a person deemed mentally disabled. In total, 18 states have explicit laws preventing the issuance of a marriage license to an individual deemed mentally unfit in some respect.⁶⁵⁹ However, unlike the restrictions on child marriage, which are standardized as applying to minors under the age of majority, there are widely varying standards for the determination of what constitutes a mental disability sufficient to deny a marriage license. For instance, seven states limit the granting of a marriage license to individuals based on a court finding of mental incapacity or the appointment of a guardian to a mentally incapacitated person. In Connecticut and Iowa, an adult under guardianship due to mental incapacity cannot consent to marriage,⁶⁶⁰ while in Minnesota and Wisconsin a guardian can provide the required vicarious consent to marriage for the incapacitated party.⁶⁶¹ Kentucky, Indiana, and New Jersey bar completely the marriage of persons adjudicated

⁶⁵⁸ *In re Marriage of Greenway* (2013) 217 Cal App 4th 628 (California Court of Appeals).

⁶⁵⁹ Alaska, Connecticut, Georgia, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin. Statute Compendium F.

⁶⁶⁰ C.G.S. § 46b-29; Iowa Code § 598.29; § 589.3. Statute Compendium F.

⁶⁶¹ Minn. Stat. § 517.03; Wis. Stat. § 765.11 (permits the petition for the marriage to be issued by a wide range of parties on behalf of the mentally incapacity party.) Statute Compendium F.

mentally incapable by the court.⁶⁶² In shockingly outdated language, Pennsylvania likewise prohibits marriage if “either of the applicants for a license is weak minded, insane, of unsound mind or is under guardianship as a person of unsound mind unless the court decides that it is for the best interest of the applicant and the general public to issue the license and authorizes the issuance of the license.”⁶⁶³

While such language may be inflammatory, the aforementioned states in fact provide the clearest standards on the denial of a marriage license to a person with a mental disability, as they require at least some formal determination of incapacity by a court. In contrast, five states leave the decision of determining mental capacity to the clerk charged with issuing licenses, with no judicial involvement.⁶⁶⁴ These states *require* clerks to deny a license on the basis of mental disability; however, what factors are sufficient to prove mental incapacity are left to the clerks, who are to decide in the moment whether a party seems incapacitated. These provisions grant broad discretion to clerks in the determination of mental disability with seemingly no formal process to verify the disability of the parties. No showing of medical records, testimony, or other documentary evidence appears to be required for these determinations, and it seems in most instances the clerk would be expected to make this decision based solely on a visual inspection.

For example, in Mississippi, clerks are directed to deny a marriage license to anyone “suffering from a mental illness or an intellectual disability to the extent that the clerk believes that the person does not understand the nature and consequences of the application for a marriage license”.⁶⁶⁵ Even more broadly, in Alaska, Nebraska, and Vermont, clerks are required to deny licenses to any party who seems incapable or incompetent to enter into the marriage, with no further instruction on what factors would confirm this incapacity.⁶⁶⁶ Tennessee’s legislation contains discriminatory language that likewise confers broad discretion to the clerk, requiring the

⁶⁶² K.R.S. § 402.020; Ind. Code § 31-11-10-1; NJ Rev. Stat. § 37:1-9. Wisconsin family law does not provide an enumerated prohibition on the marriage of an incapacitated party but provides language limiting marriage for those under guardianship.

⁶⁶³ Penn. Con. Stat. Title 23 § 1304. Statute Compendium F.

⁶⁶⁴ The statutes of Indiana, Mississippi, Nebraska, and Vermont specifically leave the decision to deny a license on the basis of mental incapacity to the clerk. Georgia’s statute does not specifically list the clerk as the decider of mental incapacity, but simply states that a license should be denied if person is no of “sounds mind” with no indication of a judicial finding of this mental impairment. Statute Compendium F.

⁶⁶⁵ Miss. Code § 93-1-5. Statute Compendium F.

⁶⁶⁶ AK Stat. § 25.05.111; Neb. Rev. Stat. § 42-103; V.S Title 15 § 512. Statute Compendium F.

denial of a license “when it appears that the applicants or either of them is at the time drunk, insane or an imbecile.”⁶⁶⁷

While clerk discretion laws are without strict regulation, they do at least provide some procedure to the denial of a marriage license on the grounds of mental incompetence. In six states, the law restricts the issuance of a marriage license on the basis of mental incapacity, but there is no procedure proscribed for the determination of this incapacity or the denial of the license.⁶⁶⁸ In these states, the law requires that parties to a marriage must be competent to consent to the agreement but provides no guidelines for how or by whom this determination of competency should be made.⁶⁶⁹

Annulment for mental disability

The more common restrictions on the marriages of persons with mental disabilities are annulment provisions. As many state statutes do not specifically enumerate the grounds of annulment, and family case law is often sealed from public search, it is challenging to create a definitive compilation of state standards from primary sources alone. Through a combination of statutory research and secondary source information from state family law practitioners, 43 states have been identified as declaring marriages automatically void or voidable on the grounds of mental disability.⁶⁷⁰ Of these, thirteen states declare all marriages where one of the parties entered into the relationship while mentally disabled void on their face.⁶⁷¹ These can be identified by the use of “shall” language, where the court cannot exercise discretion over the case and must annul the marriage upon a showing of mental incapacity. Void marriages are considered non-marriages, where the union itself is invalidated. In such cases, a third party can conceivably raise the issue of mental incapacity to the court and the marriage would be voided over the objection of the spouses.

⁶⁶⁷ Tenn. Code § 36-3-109. Statute Compendium F.

⁶⁶⁸ Georgia, Nevada, Ohio, Rhode Island, South Carolina, Missouri. Statute Compendium F.

⁶⁶⁹ *ibid.*

⁶⁷⁰ Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming. Statute Compendium F.

⁶⁷¹ Arkansas, Colorado, Delaware, Illinois, Kentucky, Minnesota, Montana, Nebraska, New York, North Carolina, Rhode Island, Virginia, Wyoming. Statute Compendium F.

The majority of such statutes require a marriage to be voided if there is a showing of mental incapacity of one of the parties at the time of marriage.⁶⁷² This indicates a concern by states that the consent given by a person with a mental disability is not sufficient to create the marriage contract. In contrast, New York's language is less clear in this regard stating, "A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto: has been incurably mentally ill for a period of five years or more."⁶⁷³ The statute reads more similarly to a "void" statute than a "voidable" statute (discussed below) but does not base the annulment on the inability of the spouse to consent at the time of marriage. Rather it seems to focus on the health of the ongoing marriage, which has presumably suffered from the ongoing mental disability of one of the spouses.

Another divergent example of such legislation in North Carolina does not explicitly cite mental disability as a ground to automatically void a marriage but speaks in more general terms that would necessarily encompass such incapacity. That legislation states, "All marriages between any two persons either of whom is at the time incapable of contracting from want of will or understanding, shall be void."⁶⁷⁴

A wider variety of states (18 in total) consider marriages voidable on the basis of mental disability.⁶⁷⁵ These statutes are identifiable by the use of "may" language, or by specifically noting that such a marriage is "voidable" at the application of the parties. Unlike automatically void statutes, voidable statutes allow for a greater level of discretion by the court in considering the circumstances of the marriage and the subsequent behavior of the parties before making a determination of annulment. In total, 17 states contain specific statutory language of voidability on the basis of mental disability or capacity.⁶⁷⁶ Several of such jurisdictions, including Alaska, California, Idaho, North Dakota, Ohio, and South Dakota, prohibit such an annulment if the parties cohabitated after the incapacitated party regained a level of mental stability.⁶⁷⁷ The statutes of Alabama, Arizona, Connecticut, Florida, Kansas, Missouri, Louisiana, and Utah do

⁶⁷² Arkansas, Colorado, Delaware, Illinois, Kentucky, Minnesota, Montana, Nebraska, Rhode Island, Virginia, Wyoming. Statute Compendium F.

⁶⁷³ NY Dom. Rel. Code § 7. Statute Compendium F.

⁶⁷⁴ NC Gen. Stat. § 51-3. Statute Compendium F.

⁶⁷⁵ Alaska, California, Georgia, Hawaii, Iowa, Indiana, Kentucky, Mississippi, New Jersey, North Dakota, Ohio, Oregon, South Dakota, Texas, Vermont, Washington, Wisconsin. Statute Compendium F.

⁶⁷⁶ Statute Compendium F.

⁶⁷⁷ *ibid.*

not specifically enumerate the grounds for annulment, but have provisions that would encompass mental disability for a court to declare a marriage voidable.⁶⁷⁸

In addition, six states have some legislation that tangentially addresses annulment on the grounds of mental incapacity, but the statutory language leaves their application unclear. For example, in Massachusetts, there is no specific provision for annulment of mental disability, but another section provides, “the issue of a marriage declared void by reason of nonage, insanity or idiocy of either party shall be the legitimate issue of the parent who was capable of contracting the marriage.”⁶⁷⁹ This reference to a marriage declared void for reason of “insanity or idiocy” indicates that mental illness would be a ground for annulment. However, no such language can be identified elsewhere in the state legislation.

South Carolina’s statute is so particularly broad as to be difficult to apply stating:

“If any such [marriage] contract has not been consummated by the cohabitation of the parties thereto the court may declare such contract void for want of consent of either of the contracting parties or for any other cause going to show that, at the time the supposed contract was made, it was not a contract.”⁶⁸⁰

Presumably the court would be asked to make a determination of mental disability to determine if there was not legitimate consent by one or both of the parties, so as to invalidate the marriage contract entirely. However, no further clarifying language is available in the statute to understand in what scenarios the court might determine that when the “contract was made it was not a contract.”

In another perplexing piece of legislation, New Hampshire states that, “Although the insanity of the petitioner may be considered by the court in determining whether a divorce should be granted, such insanity shall not constitute a defense to a petition for divorce.”⁶⁸¹ This statute clearly does not create a cause of action for annulment on the grounds of mental disability, but

⁶⁷⁸ *ibid.*

⁶⁷⁹ M.G.L Title 207 § 16. Statute Compendium F.

⁶⁸⁰ SC Code § 20-1-530. Statute Compendium F.

⁶⁸¹ NH Rev. Stat. § 458:12. Statute Compendium F.

indicates that a divorce may be granted over the objections of a party declared “insane.” Likewise, in Oklahoma, mental illness is only addressed in the divorce provisions of the state code.⁶⁸² Finally, in Pennsylvania and Tennessee, there are not specific provisions allowing for annulment based on mental disability, but these states prohibit the issuance of marriage licenses to mentally incapacitated parties.⁶⁸³ Presumably a marriage would then be void upon a showing that a license was improperly issued to such a party.

Laws Related to the Marriage of Persons with Mental Disabilities

As evidenced by this overview, legislation on the marriage and dissolution of marriages of persons with mental disabilities lacks cohesion and clarity. States vary greatly in their recognition of the capacity of persons with mental disability to consent to marriage, and there is concerning little guidance on how such determinations should be made by licensing authorities and state family law courts. Unlike with child marriage, where almost all states have introduced recent legislation to amend their marriage-age laws in an attempt to eliminate such inconsistencies, no such major reform efforts are evident in the area of mental disability. However, there has been some recent attention given to related areas of legislation including marital exceptions to rape on the basis of mental incapacity and the automatic termination of state disability benefits after marriage.

Marital exceptions to rape on the basis of mental incapacity

While surprisingly little legal discourse has been aimed at the ability of persons with mental disabilities to marry, significantly more controversy surrounds the capacity of such parties to consent to sex. As discussed above, the sexual lives of persons with mental disabilities have historically been strictly regulated due to eugenics-based discrimination. As persons with mental disabilities gained more recognition as independent individuals in the 20th century, their right to consent to sex has also slowly expanded. As stated by the court in *State v. Schlichter*, “the mere fact that a woman is weak-minded does not disable her from consenting to [sex].”⁶⁸⁴ However, even in the modern era, with its growing recognition of the rights and autonomy of persons with

⁶⁸² Okla. Stat. Title 43 § 101. Statute Compendium F.

⁶⁸³ Penn. Con. Stat. Title 23 § 3305(a)(5); Tenn. Code § 36-3-109. Statute Compendium F.

⁶⁸⁴ *State v. Schlichter* (1815) 263 Mo 516 (Missouri). Note that based on the language and history of this case, the court’s ruling was perhaps more rooted in making cases of questionable consent permissible for male perpetrators. However, the court’s language is one of the first cases to recognize the sexual agency of a mentally disabled party.

mental disabilities, the issue of when and how these individuals can give valid consent to sexual relations is still murky. This is particularly prescient when the person with a mental disability is married.

Currently, all states criminalize at some level sexual relations with an individual who is deemed mentally incapable of giving consent.⁶⁸⁵ For this purpose, mental disability is generally categorized similarly to intoxication as taking away the ability of one party to give authentic consent. In her comprehensive study of state criminal statutes and relevant case law, Linder identifies six major standards by which states categorize protections for persons with mental disabilities against sexual contact. First is morality, which Linder defines as the highest bar for capacity and is followed by five states.⁶⁸⁶ The morality standard requires that the disabled individual have both an understanding of the nature and consequences of the sexual conduct, as well as an appreciation of the “moral dimensions” of deciding to engage in that conduct.⁶⁸⁷ Second is the “nature and consequences” standard, followed by 13 states, which requires that the disabled individual be able to comprehend the nature of the sexual activity and potential consequences (such as pregnancy and STDs).⁶⁸⁸ Third is the “totality of circumstances” test, which is only applied in Illinois, and expands on the nature and consequences standard to include context of the incident in question.⁶⁸⁹ Fourth, and the most widely applied, is the “nature of the conduct” test, which requires that the disabled party understand the sexual nature of the conduct and be able to voluntarily participate.⁶⁹⁰ Fifth is the “judgement” test, applied only in Georgia and Minnesota, where the standard for capacity requires only that the person with a disability be able to “exercise judgement” regarding the sexual activity.⁶⁹¹ Finally, sixth is “evidence of disability”, which applies in states that have no specific test for defining sexual consent capacity, but instead look at evidence of the individual’s disability to determine the validity of her consent.⁶⁹²

While the issue of mental disability and sexual consent has never reached the Supreme Court, other federal courts have continuously upheld the right of legislatures to restrict the sexual

⁶⁸⁵ See Linder (n 640) at 12-73.

⁶⁸⁶ *ibid* at 11.

⁶⁸⁷ *ibid*.

⁶⁸⁸ *ibid*.

⁶⁸⁹ *ibid*.

⁶⁹⁰ *ibid*.

⁶⁹¹ *ibid*.

⁶⁹² *ibid* at 12.

consent of persons with mental disabilities in the name of their protection.⁶⁹³ However, many scholars have argued that these legislative restraints are overbroad and “unduly restrictive”.⁶⁹⁴ For example, Fischel and O’Connell argue that “paternalist legislation may unjustifiably impede persons with disabilities’ wanted sexual relations.”⁶⁹⁵ Perlin and Lynch likewise assert that case law stemming from these restrictions “reflects ongoing infantilization of women with mental disabilities.”⁶⁹⁶ These scholars draw heavily from the insights of Deborah Denno’s 1997 empirical study on state criminal law, where she concludes that “all tests appear to judge mentally retarded victims under a higher consent standard than nonretarded victims.”⁶⁹⁷

In contrast, Harris challenges the overriding assumption that current laws are overbroad in their restriction of sexual relations. She contends that the aforementioned scholars are too reliant on the Denno study (which is over two decades old) and instead completes her own assessment of state law.⁶⁹⁸ She concludes that these laws are not unduly vague, and in fact courts consider a broad range of factors, including expert testimony, IQ tests, and adaptive ability assessments, which provide a more comprehensive evaluation of individual consent than is assumed by the predominant literature.⁶⁹⁹ She also argues that the majority of research focuses on institutionalized persons, while in reality, most sexual abuse cases of persons with mental disabilities arise from those living in community care (with families, communal living, etc.)⁷⁰⁰

While the debate on the criminal law surrounding sex and persons with mental disabilities rages, there is surprisingly little discussion of the sexual consent of persons with disabilities within marriage. While in the majority of states, married individuals are entitled to the same protections on mental capacity to consent to sex, 13 states explicitly exempt married couples from the

⁶⁹³ See eg *Anderson v Morrow* (2004) 371 F3d 1027 (9th Circuit) at 1033; *People v Thompson* (2006) 142 Cal App 4th 1426 (California Court of Appeals).

⁶⁹⁴ A Boni-Saenz, ‘Sexuality and Incapacity’ (2015) 79 Ohio State Law Journal 1201 at 1213-1223; see also E Emmens, ‘Intimate Discrimination: The State’s Role in the Accidents of Sex and Love’ (2009) 122 Harvard Law Review 1307 at 1313 (finding that overly restrictive legal interventions create “intimate discrimination” against disabled people).

⁶⁹⁵ J Fischel and H O’Connell, ‘Disabling Consent, or Reconstructing Sexual Autonomy’ (2015) 30 Columbia Journal of Gender and Law 428 at 430.

⁶⁹⁶ M Perlin and A Lynch, ‘All His Sexless Patients: Persons with Mental Disabilities and the Competence to Have Sex’ (2014) 89 Washington Law Review 257.

⁶⁹⁷ D Denno, ‘Sexuality Rape and Mental Retardation’ [1997] University of Illinois Law Review 315. Note that the term “mentally retarded” is outdated terminology that is no longer accepted by the disability advocacy community.

⁶⁹⁸ See Harris (n 634) at 486.

⁶⁹⁹ *ibid* at 537-544.

⁷⁰⁰ *ibid* at 489-490.

ordinary restrictions on sex with a mentally disabled party.⁷⁰¹ Of these states, eight have no specific provisions prohibiting the issuance of a marriage license to persons with mental disabilities.⁷⁰² Therefore, a person with a mental disability which would ordinarily preclude her from giving consent under the state's rape laws could be granted a marriage license with no additional scrutiny from the licensing authority, and then all sex within that marriage would be excluded from the state's rape laws under the marital exception.

A small number of state legislatures have recognized the inconsistency in these laws and the potential for exploitation of persons with mental disabilities as a result. For example, California eliminated its marital exception for the rape of a person with a mental disability in 2021.⁷⁰³ The change eliminated prior statutory language that stated that sexual contact where one party is "incapable of giving legal consent because of mental disorder or developmental or physical disability" is not rape if the couple is married.⁷⁰⁴ Sponsor of the bill, Assemblymember Cristina Garcia, cited protectionist concerns for persons with mental disabilities as a primary motivation for the change stating, "From the beginning of our efforts, we have been clear that rape is rape. And a marriage license is not an excuse for committing one of society's most violent and sadistic crimes."⁷⁰⁵ Despite the bill's passage, it was not without criticism. Other Californian legislators argued that elimination of the exception would create too high a bar for assessing sexual consent within marriages. For instance, Assemblymember Reggie Jones-Sawyer questioned if the law would "dismantle family units due to false accusations."⁷⁰⁶

Rhode Island also eliminated its marital exception to rape of a mentally incapacitated party in 2021.⁷⁰⁷ Sponsor of the bill Senator Dawn Euer, stated that while issues on sexual consent in marriage can become "generational fights", the update was necessary "because consent is every

⁷⁰¹ Alabama, Connecticut, Idaho, Iowa, Kentucky, Maryland, Michigan, Nevada, New York, Ohio, South Carolina, South Dakota. Statute Compendium D.

⁷⁰² Alabama, Idaho, Maryland, Michigan, New York, Ohio, Oklahoma, and Virginia. Statute Compendium F.

⁷⁰³ C Baker, 'California Law Eliminates Spousal Rape Exemption—But "Patriarchy Still Dies Hard"' *Ms. Magazine* (13 October 2021).

⁷⁰⁴ California Assembly Bill 1171 (2021).

⁷⁰⁵ 'Bill to End Spousal Rape Distinction Is Signed by Governor' *Office of Senator Dave Cortese* (7 October 2021) <<https://sd15.senate.ca.gov/news/bill-end-spousal-rape-distinction-signed-governor>>.

⁷⁰⁶ B Rodriguez, 'Why Bills to End Spousal Rape Loopholes Hit Snags' *19th News* (20 May 2021) <<https://19thnews.org/2021/05/why-bills-to-end-spousal-rape-loopholes-hit-snags/>> (Jones-Sawyer did eventually support the bill when it came to an Assembly vote.)

⁷⁰⁷ E Fitzpatrick, 'R.I. Senate Unanimously Votes to Remove Spousal Exemption for Rape of Incapacitated Victims' *Boston Globe* (15 June 2021).

person's inalienable right."⁷⁰⁸ Similarly in 2019, Minnesota eliminated its marital rape exception for persons with mental disabilities. The bill was introduced not as a result of concerns for mental disability, but incapacity due to drugging the victim.⁷⁰⁹ However, the result of the change was to eliminate the state's existing exclusion which stated that sexual offenses as a result of the victim being "mentally impaired, mentally incapacitated, or physically helpless" do not apply to spouses.⁷¹⁰ Governor Tim Waltz said of the change, "The concept of a pre-existing relationship defense should've never been part of our criminal statutes."⁷¹¹

In Ohio, some legislators have repeatedly introduced legislation to eliminate the state's marital rape exception, with little success. For example, Representative Kristen Boggs has proposed such bills every session since 2017, but as of writing, this legislation has yet to proceed to a full vote. Of the reluctance by her colleagues to advance the legislation, Representative Boggs stated that other lawmakers have expressed concerns to her about "false allegations" of rape by spouses during divorce proceedings, to which she responded, "I don't know if they think it's going to result in these unfair convictions, or if they are afraid that someone is going to be falsely indicted but then proven innocent. It really doesn't land with anyone who understands how the criminal justice system works."⁷¹²

In the 37 states that do not have marital rape exceptions for mental incapacity, the relationship between sex, mental disability, and marriage is still unclear. By issuing a marriage license to a person with a mental disability, as is permissible in the majority of states, the state impliedly assumes that the couple will engage in sexual intercourse. If then the state also has a sexual assault statute that prohibits sexual conduct with an individual who has a mental disability, how do we reconcile these laws? How is a court to assess an allegation of sexual assault due to the mental disability of the victim, when the State itself sanctioned the sexual contact through issuance of the marriage license? Would punishing such sexual conduct serve to protect persons with mental disabilities or further restrict them from access to meaningful, adult relationships? These questions remain largely unanswered by lawmakers and legal scholars alike.

⁷⁰⁸ *ibid.*

⁷⁰⁹ B Bierschbach, 'This Woman Fought To End Minnesota's "Marital Rape" Exception, And Won' *NPR* (4 May 2019).

⁷¹⁰ *ibid.*

⁷¹¹ A Vera, 'Marital Rape Is No Longer Legal in Minnesota with New Law' *CNN* (3 May 2019) <<https://edition.cnn.com/2019/05/03/us/minnesota-marital-rape-repeal/index.html>>.

⁷¹² Rodriguez (n 706).

Termination of benefits based on marriage

Another area of legislative reform has arisen in relation to the marriage of persons with mental disabilities: the automatic withdrawal of state benefits. Under current Social Security law, individuals can only claim disability benefits (SSDI) if they themselves have made qualifying payments into the program or if they have a parent who has done so. When the individual is relying on parental payments the person with a qualifying disability can receive SSDI payments after reaching the age of majority as a “Disabled Adult Child” (DAC).⁷¹³ SSDI for DAC individuals is a critical support mechanism for many persons with disabilities, as the unemployment rate in the disabled community in the US is twice the rate of non-disabled workers.⁷¹⁴ Under ordinary circumstances, in order for an individual to be stripped of SSDI benefits as a DAC, it would have to be demonstrated that the individual now has an independent means of financial support, or that the individual no longer has a qualifying disability.⁷¹⁵ Many DACs therefore remain on SSDI for their entire lives. However, SSDI benefits automatically terminate if a DAC marries a person without a disability.⁷¹⁶

Other benefits, such as SSI and Medicaid, are also affected, and sometimes terminated, when a person with a disability marries.⁷¹⁷ As with children who are automatically emancipated upon marriage, the law presumes that once an individual with a disability marries, she somehow gains a level of capacity to financially and domestically support herself, or at least her spouse assumes that responsibility. In reality, the individual’s capacity to support herself without government assistance may not have changed at all upon marriage and yet she is now without the same level of financial support. These restrictions are a significant barrier for many persons with disabilities who seek to marry but cannot do so without fear of losing their only income.⁷¹⁸

⁷¹³ ‘Benefits For Children With Disabilities’ (Social Security Administration 2025) No. 05-10026.

⁷¹⁴ K Andara, A Neal and R Khattar, ‘Disabled Workers Saw Record Employment Gains in 2023, But Gaps Remain’ *Center for American Progress* (22 February 2024).

⁷¹⁵ ‘Benefits For Children With Disabilities’ (n 713).

⁷¹⁶ In some instances, if two individuals with a qualifying disability marry, they can remain on SSI benefits. However, this is not always the case and depends on an extensive list of additional factors related to the individual positions of the spouses. *ibid.*

⁷¹⁷ *ibid.*

⁷¹⁸ See generally D Evans, ‘Marriage Equality’ (Center for Disability Rights) <<https://cdmnys.org/blog/disability-dialogue/the-disability-dialogue-marriage-equality/>> accessed 4 February 2025.

As a result, recent legislation has emerged to address this issue, most notably the Marriage Equality for Disabled Adults Act.⁷¹⁹ The Act would eliminate the automatic termination of SSDI benefits to married DACs, as well as ensure that SSI and Medicaid payments are not disrupted if a recipient marries.⁷²⁰ The bill's sponsor, US State Representative Jimmy Panetta, has stated of the bill:

By taking away the medical benefits from Disabled Adult Children who get married, current law is forcing Americans to choose between their happiness and health care... Every American, no matter who they are and without being penalized, should be able to marry who they love.⁷²¹

Similarly, in 2024, US Representative Raúl Grijavalva introduced the Supplemental Security Income Restoration Act, which would “eliminate [the] 25% asset penalty for married people receiving SSI.”⁷²² Of the legislation, Representative Grijavala said:

SSI has long been a last resort and a critical safety net for keeping seniors and those with disabilities from falling into poverty. It's ridiculous that for almost fifty years, we have largely failed to make basic updates to ensure the program does what it was intended to do – meet basic needs for blind, disabled, and aged people who will otherwise go without. The last year has been especially harsh on these vulnerable populations, and it is time that Congress step up to make these modest but necessary updates to the program.⁷²³

Both the Marriage Equality for Disabled Adults Act and the Supplemental Security Income Restoration Act have garnered significant support from disability advocacy groups nationwide, who hail them as protecting the right of persons with disabilities to marry without fear of

⁷¹⁹ Marriage Equality for Disabled Adults Act, H.R. 6640, introduced 6 December 2023.

⁷²⁰ ‘Rep. Panetta Authors and Reintroduces Legislation to Ensure Marriage Equality for Disabled Adults’ (Office of Representative Jimmy Panetta, 28 January 2023) <<https://panetta.house.gov/media/press-releases/rep-panetta-authors-and-reintroduces-legislation-ensure-marriage-equality>>.

⁷²¹ *ibid.*

⁷²² Supplemental Security Income Restoration Act, H.R. 7138, introduced 30 January 2024.

⁷²³ ‘Supplemental Security Income Restoration Act Reintroduced’ *National Low Income Housing Coalition* (14 June 2021) <<https://nlihc.org/resource/supplemental-security-income-restoration-act-reintroduced>>.

financial repercussions.⁷²⁴ However, the status of these bills in Congress is not yet settled, where both Acts have yet to move to a House vote.⁷²⁵

Conclusions

While there is much modern policy discussion on child marriage legislation, this chapter has demonstrated that there has been little legislative discourse on marriage laws related to persons with mental disabilities. We can still however assess the current legislative landscape to summarize the overall relationship between mental disability and marital consent. As with children, almost all states recognize at some level a restriction on marital capacity based on mental disability. However, while children are defined narrowly as a social group by age, the classification of mental disability for purposes of marriage is incredibly broad and loosely defined across states.

In the case of child marriage, the restrictions on marriage are predominately aimed at the issuance of the marriage license. These restrictions appear protective in nature, as they prevent a child from entering a marriage to which they cannot give valid consent. In contrast, only a small percentage of states prevent the issuance of a marriage license based on mental disability, and as discussed above, those provisions are often broad and unclear in their application. The majority of restrictions are therefore aimed at annulling the marriages of persons with mental disabilities. These provisions could be seen as protective of the person with a disability, but in some cases, such as in New York, seem to be aimed more at allowing a spouse the opportunity to void a marriage where the other party has an ongoing mental disability.⁷²⁶

The laws on marriage for persons with mental disability seemingly clash with other areas of law aimed at mental capacity, most notably, capacity to consent to sex. As discussed, all states criminalize to some extent sexual relations with a person who lacks the mental capacity to consent to sex, but the guidelines on what constitutes valid consent in these circumstances varies greatly. It is not clear that the state guidelines on sexual consent will be applied to the context of

⁷²⁴See Evans (n 718); R Salkin, 'The Cost of Love: Marriage Equality for Disabled LGBTQIA+ People' (National Organization for Women, 11 September 2024) <<https://now.org/blog/the-cost-of-love-marriage-equality-for-disabled-lgbtqia-people/>>.

⁷²⁵ Status of H.R 6640 and H.R 7138 (*Congress of the United States*) <[congress.gov](https://www.congress.gov)> accessed 8 February 2024.

⁷²⁶ NY Dom. Rel. Code §7. Statute Compendium F.

marriage, and no sources have been identified by this research that suggest that courts or clerks apply these standards when issuing a marriage license to a person with a mental disability. This issue is further complicated in the 13 states that exclude married couples from the ordinary criminal sexual assault law. Entering a marriage does not change the mental capacity of a party to consent to sex; however, by issuing a marriage license to such a person in these states, judges and clerks are essentially providing a form of vicarious consent on behalf of the person with a mental disability. As with states that have statutory rape exceptions for children, this creates a system where third parties can grant sexual access to an party of limited capacity in a way that would be impermissible in any other context but marriage.

This inconsistency is also prevalent in the debate on marriage and disability benefits. By automatically terminating or limiting disability benefits upon marriage, the current legislative system envisions that upon marriage, persons with mental disabilities suddenly no longer require state assistance to financially support themselves. As with child marriage, while marriage restrictions on persons with mental disabilities assume that such individuals lack capacity to enter a marriage, marriage itself *creates* capacity under the eyes of the law. How can it be that a person could lack capacity to independently consent to marriage, and yet suddenly gain capacity to financially self-support as soon as the marriage is granted? As noted in prior discussions throughout this thesis on statutory rape based on age, such termination of benefits is more likely grounded in fiscal concerns by financially conservative lawmakers than a measured consideration of the mental capacity of the affected parties. However, the result is a system that incongruously manufactures a level of capacity in married parties that would not exist without the marriage.

Furthermore, state courts have determined that the standard of capacity of a person with a mental disability to marry is less than the required capacity to contract or to execute a will, which seems wholly illogical. Marriage is traditionally viewed as a contract (as discussed in the previous chapter, a contract of adhesion with state-proscribed terms). Marriage involves not only emotional, and presumably sexual, components, but serious financial implications. The financial ramifications of signing a marriage contract can in fact be greater than many business decisions. Also, the marriage contract is in fact paramount to a testamentary document, as in the event of intestacy, one's possessions pass to her spouse upon death. Yet, the consent capacity required to

enter a marriage has been deemed less than the capacity required to contract or draft testamentary documents.⁷²⁷

From a protectionist view, the solution to such legal inconsistencies would be to restrict more stringently the ability of persons with mental disabilities to marry, in an effort to protect them from non-consensual contracts and sexual relations. However, from a disability rights perspective, the current system is already overly restrictive on the ability of persons with mental disabilities to participate in adult relationships, including marriage. While in the case of children, incapacity will inevitably be lifted in time (upon reaching the age of majority), a determination of mental disability can be lifelong. To restrict a child from marrying may be frustrating to the minor for a matter of years; to restrict a person with a mental disability from marrying may be detrimental to her legal rights for a lifetime.

In addition, as with the analysis of restrictions on child marriage, restrictions on the marriage of persons with mental disabilities may also face significant constitutional challenge. As with restrictions on children, the state would likely argue that limiting the right of persons with mental disabilities to marry serves a protective function, preventing the exploitation of individuals who lack the intellectual or cognitive capacity to understand the marital relationship or its responsibilities. However, as little empirical evidence has been conducted on the actual outcomes within marriage for persons with mental disabilities, the state's rationale is likely to be highly subjective and anecdotal.

Even if protecting persons with mental disabilities is found to be a compelling interest, certainly the current restrictions that many states place on the marriage of such persons are far from narrowly tailored. As discussed in this chapter, the categorization of mental incapacity is exceptionally broad and, in most states, ill-defined. If a state cannot even provide a concrete definition of what mental disabilities will disqualify an individual from marriage, it certainly cannot claim that such a regulation is the least restrictive possible to protect persons with limited mental capacity. The minority of states that require a judicial ruling of incapacity in order to deny a marriage license may have an argument that the statute is more narrowly tailored to the interest of protecting such individuals. However, for state laws that call simply for the denial of a license

⁷²⁷ See *In re Marriage of Greenway* (n 658).

to individuals deemed mentally incapacitated by the clerk, with no official procedure for such a determination, it is highly unlikely that such restrictions could ever be seen as narrowly tailored. Even under the lower threshold of *Zablocki*, states that prevent the issuance of a marriage license to a person deemed “mentally disabled” without any judicial or psychological assessment are unlikely to prove that these restrictions are “closely related” to such a goal. These regulations are, in many states, simply too broad and undefined to be considered closely related to any definable state objective. These laws are poised for constitutional due process challenge and could be likely overturned as overbroad infringements on the fundamental right to marry.

Furthermore, restrictions on the marriage of persons with mental disabilities may face an additional challenge of significant vagueness. While “children” are already a finite social group in every state, defined as individuals under the age of 18⁷²⁸, “mentally incapacitated persons” is far from a clearly defined social group. Mental disability is impossible to define in narrow, simple terms and encompasses a wide variety of intellectual, physiological, and interpersonal considerations. It is therefore likewise impossible, from a medical or social perspective, to neatly and accurately define a social group that would encompass all levels of mental disability. It is this inability to limit the class of “mentally incapacitated persons” that presents the most viable constitutional challenge to capacity restrictions. Where the breadth of a law is so vague that its application is unclear, it is set for constitutional challenge, even if rationally related to a legitimate government interest. Restrictions on the issuance of marriage licenses to persons with mental disabilities are, as discussed throughout this chapter, often so unclear in their language and procedure that it is hard to determine the exact applicability of the law. Therefore, such challenges, even if only subjected to rational basis review, may in fact still be found impermissibly vague or overbroad.

⁷²⁸ Excluding Mississippi, which places the age of majority at 21.

However, the fact that a provision may not comport with the Court's current due process jurisprudence does not mean that such provisions are not morally justifiable. There is strong reasoning behind the protection persons with certain mental disabilities from the ramifications of marriage, as well as from possible exploitation from parties seeking to shield otherwise prohibited sexual relations with these parties behind the curtain of "marital privacy." Rather, the issue of possible legislative and constitutional challenges of these restrictions is raised instead to further underline the need for greater national cohesion and clarity on marital consent.

PART III: CONDITIONS THAT INVALIDATE CONSENT

3.1 Force, Duress, and Coercion

As discussed in Chapter 1.2, much of the existing legislative and scholarly discourse on marital consent has been aimed at the concept of “forced marriage.” Yet, despite this focus, there remain extreme gaps in the understanding of the definition of “force” within the marriage context, as well as the often-accompanying terms of “duress” and “coercion.” States have widely disparate statutory approaches to what is broadly contextualized as “forced” marriage through both criminal and family law. The result is a legislative landscape with little cohesion, and subsequently, an almost complete non-usage of these laws, despite widespread reports of survivors seeking services throughout the United States.

This chapter will attempt to parse out the language of “force” in application to marriage. First, it will look at related terms throughout the limited US criminal law on forced marriage, as well as note the near complete absence of forced marriage prosecutions nationwide. Next, it will assess the use of terminology throughout family law, particularly state dissolution law. After determining the specific language used and its particulars throughout both criminal and family law, the chapter will then extensively break down these terms, examining their common definitions and potential legislative intent in selecting such terms. In assessing this language, this thesis finds that the terms “force”, “duress”, and “coercion”, though broadly used in relation to marriage, are incoherently defined and, subsequently, poorly enforced throughout the US. It therefore attempts to cogently define these terms with a greater level of specificity, based on definitional, scholarly, and legislative sources.

With these terms more specifically defined, it is concluded that “force” is in fact a poor choice of terminology in relation to marriage. Instead, it is proposed that duress and coercion are more applicable to the context of non-consensual marriage. Further, duress should be understood to relate to threats that solicit marital consent, while coercion should be understood as relating to certain offers that result in marital consent. The chapter concludes with suggestions for two distinct forms of non-consensual marriage: duress-based marriage and coercion-based marriage. These two definitions are designed to suggest a new standard for evaluation of non-consensual marriage, which will provide much-needed baseline definitions for future research efforts.

Force/Duress/Coercion and Marriage in US Criminal Law

At the federal level, the US has no criminal law prohibiting forced marriage as its own crime. However, there have been a few cases successfully prosecuted under the federal human trafficking law that involved forced marriage as tied to a broader scheme of labor exploitation and immigration fraud.⁷²⁹ For example, in *US v. Zahida Aman*, the victim was married to a family member of her traffickers to facilitate her transport from Pakistan to the US. Once there, she was made to serve as a domestic laborer.⁷³⁰ In another case, *US v. Hunaity*, the victim, a Sri Lankan national, was forcibly married to her trafficker as a means of obtaining a visa so she could remain in the US and continue to serve as the trafficker's maid.⁷³¹ Beyond these cases, the research has not produced any federal cases of forced marriage not related to immigration and forced labor.

At the state level, there is even less action to address forced marriage through the criminal law. Only 11 states have implemented legislation criminalizing at least some form of "forced" marriage, and the language and applicability of these statutes varies greatly.⁷³² The language of what behavior is prohibited in compelling a marriage varies. Four states prohibit the use of "force"⁷³³, five states use the term "duress",⁷³⁴ four include the prohibition on the use of "menace",⁷³⁵ and two use the term "coercion."⁷³⁶ West Virginia more broadly states only that the taking for marriage cannot be "against such person's will."⁷³⁷ These state laws can be broken broadly into two categories: those concerned with "clandestine marriage" and those concerned with human trafficking through marriage.

⁷²⁹ Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106- 386.

⁷³⁰ *United States of America v Zahida Aman, et al* (2022) United States District Court, Eastern District of Virginia Criminal Action 3:19-cr-85.

⁷³¹ *US v. Hunaity* (n 18). As a positionality disclosure, the author served as the attorney for the victim in this case in her subsequent annulment proceedings against her trafficker.

⁷³² California, Florida, Indiana, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, Oklahoma, Virginia, West Virginia.

⁷³³ California, Mississippi, Oklahoma, Virginia. Statute Compendium E.

⁷³⁴ California, Mississippi, Nevada, Oklahoma, Virginia. Statute Compendium E.

⁷³⁵ California, Mississippi, Oklahoma, Virginia. Statute Compendium E.

⁷³⁶ Florida, Maryland. Statute Compendium E.

⁷³⁷ W. Va. Code §61-2-14. Statute Compendium E.

In the first category, five states have legislation that addresses forced marriage as its own crime.⁷³⁸ Each prohibits the “taking” of a person for purposes of marriage⁷³⁹, but Ohio and Pennsylvania limit protection to only female victims.⁷⁴⁰ In addition, three states have legislation that specifically criminalizes the “taking” of a child for marriage, but only when the consent of the child’s parent is not given.⁷⁴¹ California, Mississippi, Virginia, and West Virginia include in their language a prohibition on not just the “taking” of an individual for marriage, but on “defiling.”⁷⁴² This term, no longer popularly used in modern law but retained in these statutes, is traditionally defined as an act “to debauch, deflower, or corrupt the chastity of a woman.”⁷⁴³

Amongst this first category of statutes, commonalities in statutory language (“taking”, “defiling”, etc.), as well as their limitation to only female victims in some states, paint a picture of the type of marriages state legislatures wished to prevent: clandestine and “runaway” marriages. As discussed in Chapter 1.3, many state legislatures in the 19th and early 20th century became concerned that young women would be seduced away by men promising marriage in order to persuade her to engage in sexual intercourse, therefore making the women unsuitable for a future marriage. These concerns were particularly aimed at minor girls and gave rise to many of the earliest statutory rape laws in the US.⁷⁴⁴ Massachusetts’s statute even specifically denotes the prohibition of “clandestine” marriages.⁷⁴⁵ California’s statute was originally passed in 1872 and Oklahoma’s in 1910.⁷⁴⁶ Virginia and West Virginia implemented their legislation in 1960⁷⁴⁷, and Mississippi passed its law in 1980,⁷⁴⁸ but these statutes mimic the language of the more antiquated laws in California and Oklahoma. These forced marriage statutes harken back to society’s concern for the “ruining” of a woman through clandestine marriage and have largely not been updated to reflect more modern concerns related to marriages without consent.

⁷³⁸ California, Mississippi, Oklahoma, Virginia, West Virginia. Statute Compendium E.

⁷³⁹ See Statute Compendium E.

⁷⁴⁰ Cal. Penal Code § 265; Okla. Stat. Tit.21, §§ 1118.

⁷⁴¹ Massachusetts, Minnesota, Oklahoma. Statute Compendium E. West Virginia includes in its forced marriage statute a provision regarding children, but limits criminalization to instances of “prostitution or concubinage stating, “Any person who...takes away a child under the age of sixteen years from any person having lawful charge of such child, for the purpose of prostitution or concubinage, shall be guilty of a felony...” W. Va. Code §61-2-14.

⁷⁴² California; Mississippi; Virginia; West Virginia. Statute Compendium E.

⁷⁴³ *Black’s Law Dictionary* (12th edition, 2024), ‘Defiling’.

⁷⁴⁴ See Chapter 1.3.

⁷⁴⁵ Mass. Gen. Laws ch. 272, § 1. Statute Compendium E.

⁷⁴⁶ Cal. Penal Code § 265 (amended in 2011, but retaining similar language to the original statute); Okla. Stat. Tit.21, §§ 1117, 1118, and 1119 (amended in 1999, but retaining similar language to the original statute). Statute Compendium E.

⁷⁴⁷ Va. Code Ann. § 18.2-355; W. Va. Code §61-2-14. Statute Compendium E.

⁷⁴⁸ Miss. Code Ann. § 97-3-1. Statute Compendium E.

The second category of criminal laws prohibit forced marriage as a form of human trafficking, in line with the federal law discussed above. These prohibitions, currently enacted in four states,⁷⁴⁹ perhaps demonstrate a more contemporary understanding of forced marriages than the other state statutes. However, they still fail to encompass a wide variety of scenarios of potential unwanted marriage that occurs without the financial incentives of human trafficking.

As of time of writing, there have been no state-level prosecutions for forced marriage in any of the states with criminal law statutes, nor in any other state. To confirm this, research for this thesis involved contacting the Attorney Generals' offices of all US states directly with data access requests for information on any prosecutions related to forced marriage, whether under specific forced marriage criminal laws in the 11 states where they exist, or any other law (domestic violence, human trafficking, etc.) AG representatives from Alaska, Arizona, Florida, Hawaii, Idaho, Maine, Massachusetts, Mississippi, Nebraska, North Carolina, North Dakota, Rhode Island, South Carolina, Texas, Utah, Vermont, Wisconsin, and Wyoming all responded that no such prosecutions have been reported in their states or such data was inaccessible.⁷⁵⁰ The remaining states issued no response to this data request, but additional research has also presented no forced marriage prosecutions in these states.

It is clear from both the limited statutory law and the seemingly nonexistent application of these statutes to prosecute offenders that criminal law is not currently a tool being used to combat forced marriage in the US. What remains unclear is whether it *should* be more utilized. As discussed in Chapter 1.2, there is significant debate on the efficacy of criminal law in addressing forced marriage. In the context of the US, Tahirih Justice Center arranged a large-scale meeting of stakeholders to determine if the enactment and enforcement of forced marriage criminal laws should be a priority.⁷⁵¹ Little consensus could be drawn amongst participants however. Some stakeholders argued that uniform criminalization across states would send a powerful normative

⁷⁴⁹ Fla. Stat. § 787.06 (including “forced marriage” in the definition of “services” under the state’s anti-labor trafficking law); Ind. Code Ann. § 35-42-3.5-1; Maryland (Md. Code Ann., Crim. Law § 11-303); Nevada (Nev. Rev. Stat. § 201.300). Note however, that Maryland’s statute applies only the marriage of children, not adults. Statute Compendium E.

⁷⁵⁰ Annex: Attorney General Outreach.

⁷⁵¹ ‘National Consultation- Should Forced Marriage Be a Crime in the United States’ (Tahirih Justice Center 2016).

message about the US's acknowledgement of forced marriage within its own borders.⁷⁵²

However, Tahirih found that:

On the whole, service providers shared that most clients they serve do not wish to pursue criminal charges given the complex feelings of love and loyalty they have for their families, combined with the fear of personal backlash or ostracization and further stigmatization by their communities. Participants also expressed the sentiment that, given the current political context of antiimmigrant sentiment, Islamophobia, and racism, this is an unsafe time to introduce such criminal legislation as such an effort could be appropriated by existing xenophobic dialogue and rhetoric and implemented in a way that disproportionately impacts minority communities.⁷⁵³

It seems that for now, criminal law is, and will likely remain, a minor part of non-consensual marriage intervention in the US.

Force/Duress/Coercion and Marriage in US Family Law

Unlike with criminal laws, a majority of states have a family law code that provides some form of relief in cases of a non-consensual marriage. However, there remains significant variation amongst states about how such a marriage is defined and the remedies available within the family law.

30 states have specific legislation allowing for the annulment of a marriage where the union was compelled in some way.⁷⁵⁴ 26 states specifically enumerate “force” as prohibited,⁷⁵⁵ 13 use the term “duress”,⁷⁵⁶ Pennsylvania uses the term “coercion”⁷⁵⁷, and Georgia uses the word

⁷⁵² *ibid* at 10.

⁷⁵³ *ibid* at 7.

⁷⁵⁴ Alaska, Arkansas, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Kentucky, Maryland, Michigan, Mississippi, Minnesota, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Statute Compendium G.

⁷⁵⁵ Alaska, Arkansas, California, Georgia, Hawaii, Idaho, Illinois, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Washington, West Virginia, Wisconsin, Wyoming. Statute Compendium G.

⁷⁵⁶ Colorado, Georgia, Hawaii, Illinois, Kentucky, Maryland, Montana, New Jersey, New York, Pennsylvania, Texas, Virginia, Wisconsin. Statute Compendium G.

⁷⁵⁷ PA Title 23 § 3305(a)(5). Statute Compendium G.

“menace.”⁷⁵⁸ Four state statutes do not enumerate grounds for annulment, but allow for the court to exercise discretion in voiding a marriage upon a finding of a condition that would affect the legitimate forming of the marriage agreement, which could presumably include a showing of force, duress, or coercion.⁷⁵⁹ Four additional states do not have a specific statute that allows for dissolution for a non-consensual marriage, but case law illustrates that some version of force/duress/coercion, is a sufficient grounds to annul a marriage.⁷⁶⁰ In total, only 10 states do not provide apparent annulment relief upon a showing of force/duress/coercion;⁷⁶¹ however, this does not preclude the possibility that these states will take such factors into account during a divorce proceeding.

Interestingly, 14 of the states that allow for annulment under circumstances of force/duress/coercion deny such relief when the parties have freely “cohabitated”.⁷⁶² These provisions seem to align with the concept of common law marriage, where cohabitation demonstrates the willingness to be married.⁷⁶³ However, all US jurisdictions have eradicated common law marriage. Another possible explanation for such exceptions is that lawmakers believe that if a party cohabitates with her spouse for a duration of time after the marriage, it is somehow less likely that the marriage was in fact the result of force/duress/coercion. This explanation is fundamentally flawed. As we will see in Chapter 3.3, many victims stay “freely” in their marriages for a variety of reasons, including religious custom, family or societal pressure, and concerns over children or finances. Their continued cohabitation with their spouses does not accurately indicate their willingness to have entered the marriage. Further, if the underlying reason for allowing annulment in cases of force/duress/coercion is that one or both parties could not under those circumstances give valid consent at the time of marriage and therefore the contract itself lacked proper mutual assent, the marriage should be voidable regardless of subsequent actions of the parties.

⁷⁵⁸ GA Code § 19-5-3(4). Statute Compendium G.

⁷⁵⁹ Arizona, Connecticut, Kansas, Louisiana. Statute Compendium G.

⁷⁶⁰ Alabama, Missouri, South Carolina, Tennessee. Statute Compendium G.

⁷⁶¹ Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Utah. Statute Compendium G.

⁷⁶² Alaska, California, Hawaii, Idaho, Michigan, Nebraska, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Wyoming. Statute Compendium G.

⁷⁶³ *See generally* Dubler (n 150).

Very limited information exists on how often statutes related to force/duress/coercion have been implicated to terminate marriages in the US. Indeed, collecting this information is almost impossible on a national level. State vital statistic offices, which report findings to the National Center for Health Statistics, collect only the number of dissolutions in the state, which includes both divorces and annulments without distinguishing between the two.⁷⁶⁴ Within states, dissolutions are recorded at the county level in widely variable ways making it impracticable to collect dissolution information directly from county family courts, and it is unclear how these actions are recorded. For example, the author has personally represented one plaintiff that filed for annulment on the basis of force, so has knowledge that there is at least one such case filed in the New Jersey family court system. However, upon investigation of the state court records, no public evidence of the grounds under which that action was filed was available, indicating that many county courts keep no record of dissolution grounds in their public family court records.

The limited evidence available illustrates that the vast majority of dissolution actions are filed as no-fault divorces, rather than annulment actions.⁷⁶⁵ However, this evidence was obtained through limited empirical studies and may be misleading, as many litigants, particularly *pro se* filers, (who make up the majority of dissolution applicants), may be encouraged by court services to simply file a no-fault divorce regardless of their individual circumstances for ease of processing.⁷⁶⁶ It is therefore currently infeasible to determine how many cases are decided, or indeed could have been properly decided, under state force/duress/coercion annulment law.

Some historical precedent gives insight into the types of marriages that have been invalidated under a finding of force/duress/coercion and we can glean that the bar for such annulment has been set extremely high by family courts. Traditionally, courts were unwilling to completely

⁷⁶⁴ See National Center for Health Statistics, 'Divorce Rates by State: 1990, 1995, 2000-2022', available at <https://www.cdc.gov/nchs/data/dvs/marriage-divorce/state-divorce-rates-90-95-00-22.pdf> (stating that national divorce statistics includes both annulments and, in some cases, filed divorce petitions, rather than final divorce decrees.)

⁷⁶⁵ S Scott and others, 'Reasons for Divorce and Recollections of Premarital Intervention: Implications for Improving Relationship Education' (2013) 2 Couple Family Psychology 131.

⁷⁶⁶ See eg. M Heinig, 'No-Fault Divorce vs. Fault Divorce' *NOLO* (21 April 2023) <<https://www.nolo.com/legal-encyclopedia/no-fault-divorce-vs-fault-divorce-faq.html>> ("No-fault divorce is less expensive and less time-consuming than a fault-based divorce because the spouses don't need to prove marital misconduct for the court to grant the divorce.")

void a marriage, even under a showing of duress, particularly if the parties had cohabitated.⁷⁶⁷

This reluctance was based on the general view of the importance of marriage as a societal institution, as summarized by Brown:

It must not be lost sight of that a marriage is not a mere agreement, but a status, in which the public, and the state as representing it, are interested. The public interest demands the stability of marriage, except where the conditions are so intolerable as to make the severance more desirable than the continuance. Duress is such a condition, but only if it is fairly serious.⁷⁶⁸

As discussed in Chapter 1.3, courts have been particularly reluctant to find that threats of legal punishment constitute force/duress/coercion that could invalidate a marriage. Courts for decades have applied overt pressure on parties to marry where there is evidence of pregnancy or sexual intercourse.⁷⁶⁹ In one such case, *Rogers v. Rogers*, a man was urged by the court to marry the girl whom he was accused of statutory rape against.⁷⁷⁰ Prosecutors pressured the marriage by telling the man that the punishment for the rape charge was death, when in fact the maximum penalty was imprisonment. Under this belief, the man married the minor girl. When he discovered that he had been misinformed of the legal penalty, he sought annulment under a claim of duress, which was summarily denied.⁷⁷¹ The reasoning behind such cases was summarized by Brown when he states that:

[In a] situation where a man who has wronged a girl married her so as to escape prosecution and judicial punishment for his misdeed...there can be no question that there is duress in fact here, especially when, as it often the fact, he is actually under arrest when

⁷⁶⁷ See eg. *Vroom v. Marsh*, 29 N. J. Eq. 15 (1878); *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 So. 836 (1895); *Bostick v. State*, 1 Ala. App. 255, 55 So. 260 (1911); *Houle v. Houle*, 100 Misc. 28, 166 N. Y. Supp. 67 (1917); *Burney v. State*, 13 S. W. (2d) 375 (Tex. Civ. App. 1929).

⁷⁶⁸ R Brown, 'Duress and Fraud as Grounds for the Annulment of Marriage' (1935) 10 Indiana Law Journal 473 at 475.

⁷⁶⁹ See eg. *Sickles v. Carson* (n 224); *Jackson v. Winne*, 7 Wend. (N. Y.) 45 (1831); *Scott v. Shufeldt*, 5 Paige (N. Y.) 43 (1835); *Hampstead v. Plaistow*, 49 N. H. 84 (1869); *Day v. Day*, 236 Mass. 362, 128 N. E. 411 (1920); *Wimbrough v. Wimbrough* 125 Md. 619, 94 Atl. 168 (1915); *Thorne v. Farrar*, 57 Wash. 441, 107 Pac. 347 (1910).

⁷⁷⁰ *Rogers v Rogers* (1928) 151 Miss 644 (Mississippi).

⁷⁷¹ *ibid*.

he consents to the marriage. But sound public policy prohibits the annulment under such circumstances.⁷⁷²

These historical cases give us some insight into the controversy over the definitions of force/duress/coercion in the marital context, as well as the variable weight that courts will give such claims if they are presented. Unfortunately, as few recent cases are available to help clarify the application of this legislation, we are left with little understanding of what exactly constitutes such a marriage or how conditions under force vs. duress vs. coercion differ, if at all. We must therefore now turn to an analysis of the statutory language to better understand the applicability and potential use of these terms in the modern legal landscape.

Defining Terms Under Current Laws

As we have seen by the above discussion, state statutes, both under criminal and family law, use a variety of terms to describe a marriage that is in some way non-consensual. The most common, are the terms “force”, “duress”, “menace”, and “coercion”. Upon a cursory reading, state legislatures seem to use these terms interchangeably. However, in light of the surplusage canon of statutory interpretation, *verba cum effectu sunt accipienda*, we must, if possible, read every word in a piece of legislation as if it was chosen deliberately to have its own effect.⁷⁷³ Under this canon, we must assume that no term is used simply to duplicate another provision or to have no consequence. Despite interpretative canons, it is of course possible, and indeed probable, that legislators have included terminology that is duplicative as the lawmakers lacked a unified understanding of how the terms should be interpreted. However, we must still endeavor to parse out the differences between these terms to determine how they may apply through existing state laws.

Force

30 state statutes, both in criminal and family law, mention the term “force” in relation to marriage.⁷⁷⁴ None of the reviewed statutes provide additional definitions for the term “force”, so

⁷⁷² *ibid* at 477.

⁷⁷³ The use of this canon is discussed in Chapter 1.1.

⁷⁷⁴ Alaska, Arkansas, California, Georgia, Hawaii, Idaho, Illinois, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Virginia, Vermont, West Virginia, Washington, Wisconsin, Wyoming. Statute Compendiums E and G.

we turn to alternative sources to ascertain its meaning. Black's Law Dictionary defines "force" simply as "unlawful violence", which is similar to the Oxford Dictionary definition, which states that it is "violent physical action used to obtain or achieve something."⁷⁷⁵ "Violence" is central to both definitions, and has been defined by the World Health Organization (WHO) as "the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation."⁷⁷⁶ The WHO goes on to identify four distinct types of violence: physical, sexual, psychological, or involving deprivation or neglect.⁷⁷⁷

Many legal conceptualizations of "force" come from the criminal law. The Model Penal Code does not contain a singular definition of "force" but does provide explanation of types of force in the criminal context. The first is "unlawful force", defined as "force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort."⁷⁷⁸ The other is "deadly force", which is described as "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm."⁷⁷⁹

In the criminal sphere, "force" has been discussed perhaps most frequently in the context of sexual assault. Indeed, the most concrete definition of "force" at the federal level is in the US code's prohibition on rape, which describes force as: "(A) the use of a weapon; (B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or (C) inflicting physical harm sufficient to coerce or compel submission by the victim."⁷⁸⁰ However, both legislatures and courts still grapple with how best to define "force" that overrides a victim's individual will.

⁷⁷⁵ *Black's Law Dictionary* (12th edition, 2024), 'Force'; Oxford University Press, *Oxford English Dictionary*, 'Force'.

⁷⁷⁶ 'World Report on Violence and Health' (World Health Organization 2002) at 2.

⁷⁷⁷ *ibid*; see also A Rutherford and others, 'Violence: A Glossary' (2007) 61 *Journal of Epidemiol Community Health*.

⁷⁷⁸ Model Penal Code, 'Unlawful Force'.

⁷⁷⁹ *ibid*, 'Deadly Force'.

⁷⁸⁰ 10 U.S. Code § 920 - Art. 120. Rape and sexual assault generally.

The court in the 1992 case, *State in Interest of MTS*, acknowledged this difficulty, stating that “force” as a term was devoid of any “obvious or plain” meaning.⁷⁸¹ In that case, involving the alleged sexual assault of a minor, the court looked at such factors as “strength”, “violence”, and “compulsion” to determine that the prosecution had not established that the defendant applied requisite force necessary to prove rape in that instance.⁷⁸² Similarly, in *Commonwealth v. Berkowitz*, the court concluded that “lack of consent” by the victim was insufficient to prove force by the defendant.⁷⁸³ These cases are part of a wealth of controversial precedent that sets a high bar for the force required to prove sexual assault. In response to such contentious holdings, many state legislatures have broadened their definitions of force to include a wider array of conduct. For example, the so-called “Michigan Model” states:

Force or coercion is broadly defined to include certain kinds of specific coercive actions committed by the perpetrator, such as use of actual force, actual or implied threats of physical force or of future harm or retaliation, or the ‘supervisory or disciplinary power’ of the defendant over the victim.⁷⁸⁴

Like the WHO definition of violence, the Michigan Model includes threats of physical force in its conceptualization of force itself.

Much more could be said on the definition of force in the context of sexual assault, but for the present evaluation, these discussions are of limited usefulness. In fact, perhaps controversially, this thesis argues that the use of the term “force” is largely inappropriate in the context of marriage. The inclusion of both physical force and threats of force in the definition, by for instance the WHO and Michigan Model, is circular. Force, semantically, cannot be both a physical action and a threat of that same action. To define force in this way is to say that striking someone is an identical action as threatening to strike someone. Both may be morally wrong, but they are not *literally* the same action. Viewed through what has been described in Chapter 1.4 as the “permissive” category of consent, where permissive consent makes an impermissible action permissible, “force” can be thought of its antithesis, making a permissible action morally impermissible. We can categorize force under Carr’s theory of “compulsion”, whereby an action

⁷⁸¹ *State in Interest of MTS* (1992) 129 NJ 422 (New Jersey).

⁷⁸² *ibid.*

⁷⁸³ *Commonwealth v Berkowitz* (1994) 641 A2d 1164 (Pennsylvania).

⁷⁸⁴ Michigan Comp. Laws Annotated § 750.520a-5201; *see also* T Murphy, ‘A Matter of Force: The Redefinition of Rape’ (1995) 39 Air Force Law Review 19.

by the perpetrator literally forces an action/inaction in the victim, leaving no choice on the victim's part.⁷⁸⁵ This aligns with what Bayles might describe as an "occurrent coercion", a physical act that induces a corresponding desired action in the victim.⁷⁸⁶ Ferzan similarly defines "compulsion" as "when another person deploys force to cause the act to happen", whereby the victim has no independent choice in an action.⁷⁸⁷

In contrast, Carr argues that coercive conduct leaves the victim with some form of choice, albeit a choice that may only have one reasonable decision (for instance, "give me your money or I will kill you.") He contends that this existence of independent will separates coercion from direct force stating, "Somebody who is coerced into doing something is in charge, in some sense, of what he does or how he acts."⁷⁸⁸ Bayles would describe this dichotomy as "dispositional coercion", where the victim is induced to act based on some level of coercion, but she retains some level of autonomous will.⁷⁸⁹ Wester likewise suggests that force creates a completely unwilled action in the victim, as opposed to scenarios like coercion, where the victim maintains some level of will.⁷⁹⁰ Coercion will be discussed in greater detail below.

In the context of marital consent, it is argued that "force" in itself is unlikely to be the animating reason behind a victim's consent to an unwanted marriage. If we think critically, a victim of a "forced" marriage does not consent to the union because of an instantaneous moment of violence; rather she agrees to the marriage out of fear that such violence (be it physical, sexual, psychological, or otherwise) will occur or will continue to occur. In essence, she responds not to force, but to the threat of force. She has some level of choice, but of course that choice is driven strongly by fear of the negative outcome that will occur if she chooses to deny the marriage. This existence of some independent will places marriage outside the realm of permissive consent into the model of originating consent discussed in Chapter 1.4. Her acquiescence to the marriage, however compelled by outside factors, is essential to the creation of the contract itself.

⁷⁸⁵ C Carr, 'Coercion and Freedom' (1998) 25 American Philosophical Quarterly 59 at 60.

⁷⁸⁶ M Bayles, *A Concept of Coercion* (Routledge 1972); see also M Berman, 'The Normative Functions of Coercion Claims' (2002) 8 Legal Theory.)

⁷⁸⁷ K Ferzan, 'Consent and Coercion' (2018) 50 Arizona State Law Journal 951.

⁷⁸⁸ Carr (n 785) at 60.

⁷⁸⁹ Bayles (n 786) at 50

⁷⁹⁰ P Wester, 'Freedom and Coercion - Virtue Words and Vice Words' (1985) 3-4 Duke Law Journal 541.

Therefore, while the international community largely refers to compelled unions as “forced marriage”, this thesis argues that “duress” and “coercion”, discussed below, are more appropriate terms to apply to the marital context. To acknowledge that “force” is the wrong term to apply to marriage does not mean that victims are somehow more culpable in their exploitation; rather it points to a more expansive understanding of circumstances where the will of the victim may be overridden without the use of instantaneous violence.

Duress

18 relevant state statutes use the term “duress”.⁷⁹¹ Black’s definition indicates that duress involves a threat, defining it as “Any unlawful threat or coercion used... to induce another to act [or not act] in a manner [they] otherwise would not [or would] do”; however, Oxford states that duress is “Pressure, especially actual or threatened physical force, put on a person to act in a particular way.”⁷⁹² This definition, encompasses both the act of force and threat of force. Central to the definition of “duress” is the term “threat.” This term is synonymous with “menace”, which is specifically mentioned in five state statutes related to marriage.⁷⁹³ “Menace” and “threat” are often used interchangeably, with the court in *Cumming v. State* defining menace as “to act in a threatening manner.”⁷⁹⁴ Federal courts have clarified that a “threat” is “an avowed present determination or intent to injure presently or in the future.”⁷⁹⁵

None of the relevant state criminal or family law statutory provisions provide a definition of “duress” in relation to marriage. However, California, one of the few states with a forced marriage criminal law provision, provides a definition on duress in its general prohibition on rape, contained in the same chapter as its prohibition on forced marriage. That definition defines duress in terms of a threat, stating that it is a “direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an

⁷⁹¹ California, Colorado, Georgia, Hawaii, Illinois, Kentucky, Mississippi, Maryland, Montana, Nevada, New Jersey, New York, Oklahoma, Pennsylvania, Texas, Virginia, Wisconsin. Statute Compendiums E and G.

⁷⁹² *Black’s Law Dictionary* (n775), ‘Duress’; Oxford University Press (n 775), ‘Duress’.

⁷⁹³ California (Cal. Penal Code § 265); Georgia (GA Code § 19-5-3(4)); Mississippi (Miss. Code Ann. § 97-3-1); Oklahoma (Okla. Stat. Tit.21, §§ 1117, 1118); Virginia (Va. Code Ann. § 18.2-355).

⁷⁹⁴ *Cumming v State* (1896) 99 Ga 002 (Georgia); see also *Morrill v Nightingale* (1892) 93 Cal 452 (California); *State v Cushing* (1897) 17 Wash 544 (Washington); *State v Brownlee* (1892) 84 Iowa 473 (Iowa); *Cote v Murphy* (1894) 159 Pa 420 (Pennsylvania).

⁷⁹⁵ See eg. *US v Dysart* (1983) 705 F2s 1247 (10th Circuit); *US v Marino* 148 F Supp 75 (District Court for the Northern District of Illinois); see also US Department of Justice, ‘1072. Special Considerations in Proving a Threat’ CRM 1000-1499.

act which otherwise would not have been performed or acquiesce in an act to which one otherwise would not have submitted.”⁷⁹⁶ The statute also provides that the totality of circumstances, including the age of the victim, and her relationship to the defendant, are factors to consider in appraising the existence of duress.⁷⁹⁷

While the Supreme Court has not elucidated a firm definition of duress, all federal circuits have provided some definition, but these vary significantly across jurisdictions and between criminal and civil law. For instance, the court in *US v. Gonzales*, which involved an immigration matter, defined duress as “a threat of force directed at the time of the [individual’s] conduct; a threat sufficient to induce a well-grounded fear of impending death or serious bodily injury.”⁷⁹⁸ In *McCord v. Goode*, a civil case, the court included not just threats in the definition of duress, but actions as well, finding it to be “unlawful conduct or a threat of unlawful conduct of such a character as to destroy the other party’s exercise of free will and judgment...the threat must be imminent and the party must have no present means of protection.”⁷⁹⁹ The court in *Williams v. Williams*, involving a mediation agreement between spouses, took a different approach, defining duress not in terms of the perpetrator’s actions, but on the mental state of the victimized party, stating that it is “a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition.”⁸⁰⁰ Courts have not succinctly defined duress in the marital context, but Brown has argued that duress that induces a marriage must involve “actual force, or serious threats of it” and concludes that in order to invalidate a marriage, this duress “must be very clearly shown, and must exist to a somewhat greater degree than is necessary for the invalidation of most other transactions—as for example, an ordinary contract.”⁸⁰¹

Both state and federal precedent indicate that duress requires that the individual faces a highly serious negative consequence. Courts have repeatedly found that duress must involve an extreme threat, with what the court in *US v. Bailey* referred to as “an unlawful threat of imminent death or

⁷⁹⁶ Cal. Penal Code § 261.

⁷⁹⁷ *ibid.*

⁷⁹⁸ *US v. Gonzales* (2005) 407 F3s 118 (2nd Circuit).

⁷⁹⁹ *McCord v. Goode* (2010) 308 SW3d 409 (Texas Court of Appeals).

⁸⁰⁰ *Williams v. Williams* (2006) 939 So2d 1154 (District Court of Appeals of Florida, 2nd District).

⁸⁰¹ Brown (n 768). Brown’s high bar for duress as invalidating a marriage may be his personal beliefs in the utility of marriage as a social institution, as discussed above.

bodily injury.”⁸⁰² Threats cannot merely apply pressure, but must involve the reasonable belief that dire, imminent consequences will befall the victim if she does not comply with the perpetrator’s demands.⁸⁰³ In addition, the victim must lack a reasonable means to escape the situation of duress.⁸⁰⁴

Duress is discussed frequently under the criminal law as a defense for a defendant claiming that her illegal actions were the result of threats from another. The MPC defines duress as the “use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.”⁸⁰⁵ Gaines and Miller define duress in the criminal context as “when the wrongful threat of one person induces another person to perform an act that she or he would otherwise not perform.”⁸⁰⁶ They summarize the elements of duress as 1) the threat to the defendant must be of serious bodily harm or death, 2) the threatened harm must be greater than the harm caused by the crime, 3) the threat must be immediate and inescapable and 4) the defendant must have become involved in the situation through no fault of their own.⁸⁰⁷ Wester and Mangiafico have further clarified three factors they see as central to the duress criminal defense: 1) the existence of a three-party relationship between the defendant, the victim of the defendant’s conduct, and the party applying duress to the defendant, 2) a purposefully coercive threat made against the defendant that reasonably compelled her to illegal action, and 3) that duress offers less protection against culpability than self-defense, but more than the defense of necessity.⁸⁰⁸

In the context of contractual relations, courts have in limited cases used the term duress to apply to “economic duress” that renders the consent of a party invalid. An threat can constitute economic duress if the resulting exchange is not on fair terms, and a) the threatened act would harm the recipient and would significantly benefit the party making the threat; b) the

⁸⁰² *US v Bailey* (1980) 444 US 394 (US Supreme Court); *see also US v Bryan* (1979) 591 F2d 1161 (5th Circuit); *US v Boomer* (1978) 571 F2d 543 (10th Circuit); *US v Michelson* (1977) 559 F2d 567 (9th Circuit); *US v Chapman* (1972) 455 F2d 746 (5th Circuit).

⁸⁰³ *See eg. US v Willis* (1994) 38 F3d 170 (5th Circuit); *Reese v State* (2004) 869 So2d 1225 (Florida District Court of Appeals); *see also* E Keyes, ‘Duress in Immigration Law’ (2021) 1 Seattle University Law Review 307.

⁸⁰⁴ *See eg. US v Diaz* (2013) 736 F3d 1143 (8th Circuit); *US v. Gonzales* (n 798); *see also* Keyes (n 803).

⁸⁰⁵ American Law Institute (n 778)., ‘Duress’.

⁸⁰⁶ L Gaines and L Miller, *Criminal Justice in Action*, vol 4 (Thomson Wadsworth 2007), 372.

⁸⁰⁷ *ibid.*

⁸⁰⁸ PK Wester and J Mangiafico, ‘The Criminal Defense of Duress: A Justification, Not an Excuse-And Why If Matters’ (2003) 6 Buffalo Criminal Law Review 833.

effectiveness of the threat is significantly increased by prior unfair dealing by the party making the threat; or c) what is threatened is otherwise a use of power for illegitimate ends.⁸⁰⁹ Some jurisdictions are expanding the boundaries of economic duress to situations where the offending party is not the direct cause of the victim's lesser economic position, but merely takes advantage of this distress in order to apply undue pressure to contract.⁸¹⁰

Modern feminist scholars have begun to look more closely at the effect of gender power dynamics in creating an environment of economic duress. In her Feminist Relational Contract Theory, discussed in Chapter 1.4, Thompson argues for a relational model of contracts, where we determine the outside pressures, particularly on women, in agreeing to be bound by contracts in order to determine their validity.⁸¹¹ Similarly, Gan argues that duress claims in contract relations take into account a holistic, totality of the circumstances evaluation, including the unequal positions of the parties created by gender.⁸¹² Both Thompson and Gan apply their theories to prenuptial agreements, which they argue are often disadvantageous to female spouses, but signed due to economic pressure prior to the marriage.⁸¹³ However, neither author applied this principle directly to the marriage contract itself. The concept of economic duress and voidable contracts is an interesting one, and potentially highly applicable to the context of the marriage contract. However, it is argued that it should be viewed in terms of "coercion", rather than a threat constituting duress, which shall be discussed below.

From this overview, this thesis arrives at the following overarching definition of duress: a grave and imminent threat of injury, physical or non-physical, that reasonably compels the victim to act in a way that they otherwise would not. This is a much more fitting term to be applied to the context of marriage than the term "force." As discussed above, while physical violence may precede the marriage, basic consent from the victim is gained from her fear of continued violence or other negative repercussions that would result from her refusal. In particular, while there is limited information on how compelled marriages occur in the US, as we have seen in prior chapters, many of these marriages do not involve physical violence, but rather legal, economic, religious, familial, and social pressures that push the victim to enter the union, when she otherwise would

⁸⁰⁹ Uniform Commercial Code §§ 174-176.

⁸¹⁰ See Gan (n 432) at 180.

⁸¹¹ {Citation}

⁸¹² See Gan (n 432).

⁸¹³ Thompson (n 377); Gan (n 432) at 208-216

not do so. “Duress”, which more broadly encompasses these pressures as potential threats to the victim, is therefore a more fitting term to use in the context of compelled marital consent.

Coercion

While only three related state statutes contain the term “coercion,”⁸¹⁴ as we have seen in prior chapters, this term is one of the most commonly used in discussions of “forced” marriages throughout the US. Carr has argued that “coercion” is “all but universally agreed, [as] antithetical to freedom.” However, perhaps even more so than “force” or “duress”, “coercion” is a hotly debated term that legal theorists have struggled to cogently define. As summarized by Cook, “In concept, dimension, and the realities of phenomena, coercion is indeed laden with ambiguity, complexity, and elusive ingredients.”⁸¹⁵

Oxford broadly defines coercion as, “The action of making someone do something that they do not want to do, using force or threatening to use force.”⁸¹⁶ Black’s, by contrast, defines coercion in both a physical and relational context, stating that it is “[w]here physical force is put upon a man to compel him to do an act against his will, or implied, (legal or constructive); where the relation of the parties is such that one is under subjection to the other, and is thereby constrained to do what his free will would refuse.”⁸¹⁷ The MPC defines coercion simply as a threat, stating the definition as:

To restrict another’s freedom of action to his detriment, he threatens to: (a) commit any criminal offense; or (b) accuse anyone of a criminal offense; or (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (d) take or withhold action as an official, or cause an official to take or withhold action.⁸¹⁸

Bentham finds that coercion is either a compulsion or restraint that causes one to do something that would otherwise be considered disagreeable,⁸¹⁹ while Lucas states that “a man is being

⁸¹⁴ Fla. Stat. § 787.06; Md. Code Ann., Crim. Law § 11-303; PA Title 23 § 3305(a)(5). Statute Compendium G.

⁸¹⁵ S DuBois Cook, ‘Coercion and Social Change’, *Coercion* (Routledge 1972) at 115.

⁸¹⁶ Oxford University Press (n 775), ‘Coercion’.

⁸¹⁷ *Black’s Law Dictionary* (n 775), ‘Coercion’.

⁸¹⁸ Model Penal Code, ‘Coercion’.

⁸¹⁹ See J Bentham, *The Principles of Morals and Legislation* (Hafner Publishing Co 1965).

coerced when either force is being used against him or his behavior is being determined by the threat of force.”⁸²⁰ Likewise, Bay contends that “when a person strongly wants to do something (or remain passive) and is forcibly restrained (pushed) we speak of ‘coercion’”⁸²¹ Berman defines a two-fold normative view of coercion, whereby 1) the coercer has acted wrongly and 2) the coercee’s actions were a result of that wrongful action.⁸²² All of these definitions overlap significantly with the conceptualizations of “force” and “duress” discussed above. Further, they generally do not help us clarify what level of coercion will be found to override the will of the victim.⁸²³

MacCormick defines coercion in terms of removal of choice, saying that “coercion entails deprivation of any real choice on the victim’s part as to what he is to do or suffer.”⁸²⁴ Frankfurt refers to this lack of choice when he states that coercion involves the application of an “irresistible desire” to compel action in the victim.⁸²⁵ However, this is contested by theorists such as Carr, who argue that while coercion puts extreme strain on a victim in his choice-making, it can be distinguished from compulsion, where the victim is left with literally no choice. Carr argues instead that, “Somebody who is coerced into doing something is in charge, in some sense, of what he does or how he acts. Being coerced, then, involves being faced with a (particular kind of) choice...”⁸²⁶ Ferzan likewise finds some element of choice in coercion, defining it as “an act that wrongfully *reduces* another person’s choice set by threatening to make the coercee worse off if the coercee does not comply with the coercer’s demand.”⁸²⁷

Even as Carr and Ferzan’s theories help us distinguish “coercion” from “force”, they do little to clarify the term from “duress”, where the victim chooses to act based on a threat. Indeed, Ferzan states that a threat is an “essential element” of coercion and that “[t]o know if something is a threat, we need to know whether its execution will make the coercee worse off.”⁸²⁸ If, as the

⁸²⁰ JR Lucas, *The Principles of Politics* (The Clarendon Press 1966) at 57.

⁸²¹ C Bay, *The Structure of Freedom* (Stanford University Press 1970) at 16-17.

⁸²² Berman (n 786).

⁸²³ See Ferzan (n 787) at 957 (“We need one view of coercion to tell us when the consentor’s choice is so constrained that it cannot be deemed the exercise of the normative power of waiving her right not to be touched.”)

⁸²⁴ MacCormick (n 502).

⁸²⁵ HG Frankfurt, ‘Coercion and Moral Responsibility’, *Essays on Freedom of Action* (Routledge Kegan Paul 1973) at 63-86.

⁸²⁶ *ibid* at 60.

⁸²⁷ Ferzan (n 787) at 959 (emphasis added).

⁸²⁸ *ibid* at 960.

current legislation and scholarship suggests, “coercion” is simply a showing of force or threat, how can we, if at all, define this term on its own? It can seem that the term “coercion” is so nebulous as to provide little clarification as to what sort of behaviors are impermissibly coercive. For this reason, Wright argues for the elimination of “coercion” from the legal lexicon stating,

We should recognize that pursuing a reasonably determinate idea of coercion in the law, whatever the context, is vain, distracting, and unnecessary. There is no reasonably popular idea of coercion, in general or as contextualized, that performs any genuinely useful descriptive or normative work...There is no reasonably determinate conception of coercion that performs any genuinely useful role in any important legal context.⁸²⁹

He instead argues that the law should use more concrete terminology to describe prohibited behavior, such as “harm”, “consent”, and “fairness”.⁸³⁰ Wright also introduces another difficulty with the question of coercion when he postulates that, “The broad idea of inducing compliance, however, introduces the possibility of ‘control’ through rewards, through unanticipated and undeserved payments, through large or small benefits, or even through the exercise of logical persuasion.”⁸³¹

This summarizes an important query that may help us define coercion: can offers, rather than threats, ever constitute coercion? The common answer to this question has been a firm “no.” Scholars such as Nozick indicate that, “According to a rights-based analysis, there is a distinction between an offer and a threat, and only the latter will form an element of a duress claim.”⁸³² Likewise, Kristjanson concludes that offers cannot put a restraint on freedom because “the very nature of offers is to open new possibilities and extend the range of options, not to narrow the range.”⁸³³ Schulhofer creates a brightline standard in determining coercion that expressly omits

⁸²⁹ R Wright, ‘How to Do Away With Coercion In the Law’ 15 Washington University Jurisprudence Review 1 at 3, 26.

⁸³⁰ *ibid* at 3.

⁸³¹ *ibid* at 6.

⁸³² R Nozick, ‘Coercion’, *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (St Martin’s Press 1969) at 447-53.

⁸³³ K Kristjanson, ‘Freedom, Offers, and Obstacles’ (1992) 29 American Philosophical Quarterly 63 at 64.

offers stating, “To distinguish legitimate influence from impermissible coercion, the best way to begin is consider whether the inducement being deployed amounts to an offer or a threat.”⁸³⁴

However, some theorists hypothesize situations where context can indeed make an offer coercive. Ben and Feinburg argue that an “irresistible offer” can indeed coerce an action as it presents an option that a person could not reasonably refuse, regardless of the negative repercussions for the coercee.⁸³⁵ Carr envisions that such an offer can indeed constitute an “impermissible leveraging” of a victim’s options. He distinguishes between coercive threats, which he describes as “instances of conventionally impermissible leveraging in which the illicit reason for (not) doing something involves the avoidance of some conditions generally considered unpleasant, or some condition likely to be considered unpleasant by the person whose freedom is being abridged” from coercive offers, which are “instances of impermissible leveraging in which the illicit reason for (not) doing something involves receiving something generally considered desirable, or something likely to be considered desirable by the person whose freedom is being abridged.”⁸³⁶

Lyons takes an expansive view of scenarios where coercion can exist in the context of an offer. He finds that an offer is coercive if the victim is rationally reluctant to trade on those terms and if she knows that either she is entitled to easier terms than offered or that the coercer would ordinarily offer easier terms if not for the victim’s position.⁸³⁷ Berman proposes that there exists two distinct theories on coercion: one where threat is just another name for coercive proposal, or two where a coercive proposal can be a threat or an offer. He argues that if there is such a thing as a coercive offer, it is inherently biconditional: we must observe the baseline state of the coercee and view the offer in terms of a more positive outcome on one hand and a more negative outcome on the other.⁸³⁸

⁸³⁴ S Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press 1998) at 118.

⁸³⁵ S Ben, *A Theory of Freedom* (Cambridge University Press 1998) at 138; J Feinberg, *Harm to Self: The Moral Limits of Criminal Law* (Oxford University Press USA 1986) at 220-226; *see also* JP Day, ‘Threats, Offers, Law, Opinion, and Liberty’ (1977) 14 *American Philosophical Quarterly* 257 (concluding that coercion is only by threat, not by offer, and occurs when coercee cannot fail to comply without being in worse position); D Vandeever, ‘Coercion, Seduction, and Rights’ (1977) 58 *The Personalist* 377 (“Coercion occurs if there is threat of harm or with a violation of rights.”)

⁸³⁶ Carr (n 785).

⁸³⁷ D Lyons, ‘The Last Word on Coercive Offers’ (1982) 8 *Philosophy Research Archives* 393 at 405.

⁸³⁸ *ibid* at 57.

In determining this “baseline”, Wertheimer suggests a moralized view, where the perpetrator contributes to the victim being in a position worse than he “*ought* to be”.⁸³⁹ In this way, exploitation can occur even through an offer if one takes advantage of the fact that someone is already below a moral baseline. Wertheimer clarifies that, “Exploitation can also involve a constrained choice...”⁸⁴⁰ Wester proposes that there is no one societal moral baseline by which we can assess coercive offers. He therefore proposes three elements that can help us in making this determination. The first is a normative standard, where we define the baseline of the coercee as the worst position in which the proponent of a proposal ought to leave the recipient of the proposal as a consequence of the recipient’s refusing to do the proponent’s bidding.⁸⁴¹ The second is the preferred condition of the coercee under the circumstances.⁸⁴² Third is the temporal element, where we observe the recipient’s condition at the instant time before the proposal.⁸⁴³

Nozick exemplifies the issue of this moral “baseline” in assessing coercive offers in the following hypothetical: A is an enslaver who regularly beats enslaved person, B. One day A proposes to spare B his regular beating if and only if B now does X.⁸⁴⁴ Technically, A has made an offer to B that will put him in a preferable position to the beating. However, in the context of wider abuse, we cannot say that this offer is not coercive, as it is predicated on B being in a position morally far below where he *ought* to be. Beyond hypotheticals, the law indeed already prohibits many scenarios where an offer is deemed overly coercive based on the baseline condition of the offeree, such as prisoner experimentation, organ sales, and some surrogate motherhood for profit.⁸⁴⁵

The possibility of coercion as an offer is highly applicable to the marriage context. Let us take for example an argument raised in the recent debate over child marriage legislation. In Maryland in 2018, a bill was proposed that would eliminate all exceptions allowing for marriage for children under the age of 18.⁸⁴⁶ Feminist and children’s advocacy groups were largely in support of the bill. However, opposition came from an unexpected source: NARAL Pro-Choice Maryland, a

⁸³⁹A Wertheimer, *Exploitation* (Princeton University Press 1996) at 212.

⁸⁴⁰ *ibid.*

⁸⁴¹ *ibid* at 576.

⁸⁴² *ibid* at 577.

⁸⁴³ *ibid* at 578.

⁸⁴⁴ Nozick (n 832).

⁸⁴⁵ *See* Berman (n 786).

⁸⁴⁶ Maryland H191, S670 (2018).

progressive reproductive rights organization. Executive director, Diana Philip, vehemently spoke out against the bill.⁸⁴⁷ Her reasoning was that, in Maryland, children are automatically emancipated upon marriage. As discussed in Chapter 2.1, the ordinary emancipation process in most states is extensive, and Maryland was no exception. Therefore, if a minor was experiencing abuse at home, NARAL argued that the child should be made aware that the quickest and most efficient way to remove her from her parents' care was to marry, thereby automatically emancipating her.⁸⁴⁸ This argument faced extreme push-back by other nonprofit organizations, who countered that encouraging an abused minor to marry would only open her to more potential abuse and that child protection services should be the intervention mechanism for such children, not marriage.⁸⁴⁹ However, NARAL stood firm in its argument that if the minor was offered marriage as a means to escape an abusive home, it was the child's decision and should be respected by the state legislature.

Let us look at the case proposed by NARAL in light of the definition of coercion discussed above. Let us also presume that the "baseline" of a child's experience should be a home where she does not experience physical or emotional abuse. If a girl is experiencing abuse at home, she is therefore starting at a baseline below where she "ought" to be. Then, an adult man, knowing of the child's abusive home, offers to marry her, thereby emancipating her. If she accepts, she may be, at least temporarily, in a better position than she was previously. Certainly, this case cannot be classed as compelled by "force" or "duress", as no violence or threat (physical or otherwise) has been aimed at the child specifically to induce the marriage. Rather, she is choosing to enter the marriage as it seems to present a "lesser of two evils". As discussed above, many have argued that coercion cannot occur when an individual is given an offer and therefore this situation *de facto* does not qualify as coercive. However, it seems illogical to conclude that there is no element of coercion in this scenario. The minor girl is compelled into marriage by her substandard circumstances, which are known by the man offering marriage. Her baseline is lower than it "ought to be", and therefore any alternative may seem like a positive inducement but is in fact predicated on an exploitative situation.

⁸⁴⁷ Maryland Senate Judiciary Committee, Hearing on S670, 8 April 2018 (testimony of Diana Philip, NARAL Maryland).

⁸⁴⁸ *ibid.*

⁸⁴⁹ *ibid* (testimony of Unchained At Last and the Ayaan Hirsi Ali Foundation).

With cases like this in mind, this thesis argues for a radical departure from the customary terminology of coercion and suggest it be defined as follows: an offer by a perpetrator that compels a victim to act/not act in a way which she would not without extreme external pressuring factors. This new definition for the first time firmly distinguishes duress from coercion in a way that has not been satisfactorily outlined in previous literature. In proposing this definition, it is not suggested that all offers which are in some way coercive be immediately invalidated; rather it is simply argued that we accept that there are indeed some offers that are coercive in nature and look at these agreements from a broader, more holistic standpoint, particularly in the case of marriage.

Conclusions

The above examination attempted to arrive at clear and cogent definitions for “force”, “duress”, and “coercion” that help us understand these terms in their broad application. We see from this analysis that lawmakers have seemed to throw any “bad” marriage under the blanket term of “force”, when in fact the term does not provide a great deal of insight into the reality of what sort of marriage should be prohibited and under what circumstances. It occurs to me that the term “force” as applied to non-consensual marriages has resulted in a similar confusion as the term “human trafficking” has in cases of commercial sexual and labor exploitation. The use of the term “trafficking” has led to the widespread misconception that there must be transport of the victim in order for the offense to occur; however, in fact the victim need not be relocated in order for human trafficking to take place. Government agencies and advocacy groups report that misunderstanding of the term “trafficking” amongst the general public, law enforcement, and even lawmakers is a significant impediment in addressing this issue on a widespread level.⁸⁵⁰

Similarly in the case of non-consensual marriages, using the term “force” as a blanket term does a disservice to efforts to raise public awareness of this issue. Force, colloquially, conjures an image of a victim and a perpetrator. Yet, many who use the term “forced marriage” envision no such dynamic. Take for instance the Council of Europe definition highlighted in Chapter 1.2:

⁸⁵⁰ See eg. National Human Trafficking Hotline, ‘Myths & Facts’ <<https://humantraffickinghotline.org/en/human-trafficking/myths-facts>> accessed 6 March 2025; Department of Justice, ‘Understanding Human Trafficking Fact Sheet’ (2025); Unseen, ‘7 Human Trafficking Facts and Myths You Need to Know’ (21 July 2023) <<https://www.unseenuk.org/human-trafficking-facts-and-myths/>>; Department of Homeland Security, ‘Myths and Misconceptions’ <<https://www.dhs.gov/blue-campaign/myths-and-misconceptions>> accessed 6 March 2025.

[Forced marriage is] an umbrella term covering marriage as slavery, arranged marriage, traditional marriage, marriage for reasons of custom, expediency or perceived respectability, child marriage, early marriage, fictitious, bogus or sham marriage, marriage of convenience, unconsummated marriage, putative marriage, marriage to acquire nationality and undesirable marriage.⁸⁵¹

How can the term “force”, which even at its broadest conceptualization requires some level of threat to a victim, rationally encompass all of these situations? Indeed, some of the examples listed by the Council have no “victim” at all, such as “unconsummated” marriages or marriages of “convenience.” The use of “force” as an overarching term for such a wide array of situations creates significant confusion and threatens to undermine discourse on this issue. As a result, this thesis has used the term “non-consensual marriage”, as discussed in the Introduction. Having concluded that “force” cannot be the blanket term for discussions of non-consensual marriage, this thesis has explored alternative terminology that could be more specifically defined and better-suited to the context of non-consensual marriages. As a result, the following two definitions in the context of marriage have been crafted to provide more clarity than the existing legislation or scholarship currently presents:

Duress-Based Marriages: Marriage where a party consents to enter or to remain in the union under threat of injury, when the party otherwise would not have consented. The threatened injury can be physical, emotional, mental, social, or any other form of injury that would result in severe distress to the consenting party. The threat can be made by the other spouse or by a third party.

Coercion-Based Marriage: Marriage where a party consents to enter or to remain in the union based on a compelling offer, when they would not have agreed without extreme external pressuring factors and the offering party is aware of these factors. External pressuring factors can be based in economics, social conditions, or other hardships which severely impact the health, safety, and/or security of the consenting party.

⁸⁵¹Rude-Antoine (n 24).

These definitions are non-circular and create definitive categories; for example, unlike others discussed, these definitions do not include both threats of an action and the action itself. Both provide carefully selected, non-duplicative language that can encompass the broad spectrum of non-consensual marriages, while still maintaining more clarity and specificity than the blanket terms that have been applied in prior legislation and research. The term “force-based marriage” is purposefully excluded, as discussed above “force” under the current understanding does not appropriately fit in the marriage context. With these definitions established, let us apply them to a series of hypothetical examples.

- A) The parents of Noor, 18 years old, have arranged her marriage to a family friend from Pakistan to facilitate his immigration to the United States. When Noor resists the marriage, her fiancé routinely beats her until she finally agrees to the union.

This example, perhaps one of the most stereotypical and commonly envisioned as the example of a “forced marriage”, fits neatly under the proposed definition of “duress-based marriage.” Noor faces the threat of continued physical violence if she does not consent to the marriage, and she would not have consented to the marriage without this threat. Having established that this definition applies to the most “basic” understanding of non-consensual marriage cases, let us apply these definitions to examples that would not fit easily under the current “forced marriage” narrative⁸⁵²:

- B) Harry, 25 years old, was raised in an ultra-conservative religious community that prioritizes marriage. He excitedly marries Sally, but she quickly turns abusive. When he tries to leave the marriage, he is threatened with excommunication by his church.

Harry’s situation would also fall under the definition of “duress-based marriage.” While he entered the marriage with enthusiastic consent, he no longer wishes to remain married as a result of Sally’s abuse. However, he faces a significant threat from his community if he chooses to leave the marriage. Excommunication is a penalty likely to result in Harry’s extreme distress. As

⁸⁵² These examples are derived from a variety of case examples from service-provider reports. All names and specific details have been changed.

the definition expressly includes third parties as potential perpetrators, his church has exercised duress over Harry in order to compel him to remain in the marriage.

- C) Susan, 45 years old, has an incurable illness that requires regular medical treatments, which are exorbitantly expensive even with insurance. She agrees to marry John based only on his promise that he will pay for her medical care throughout her life. John expects their marriage to include sexual acts which Susan does not want to perform but is willing to do to secure the marriage and subsequent medical treatments.

Susan's situation falls under the definition of "coercion-based marriage." She is in a position of vulnerability that is known to John. Her medical condition, as well as its accompanying financial burden, has created an extreme external motivating factor. While accepting the marriage might put her in a better position than she is in currently, her position *ought* to be one where she can receive medical care without the need to result to a marriage. As her baseline is below the moral ideal, John's offer is inherently coercive.

Neither of these latter two examples fit neatly under the term "forced marriage" as it is currently understood, but both are clearly encompassed under the terminology suggested for duress-based marriage and coercion-based marriage. In concluding that these cases fall under the proposed definitions, no suggestion is made on how such marriages should be handled legislatively. As discussed above, there are significant concerns regarding the criminalization of non-consensual marriage, and indeed the proposed definitions are likely too broad to be converted wholesale into criminal statutory language. In the context of family law, these definitions could be used to create more uniform language in marriage dissolution statutes, replacing the general use of the ill-defined term "force" throughout annulment law. However, here again we must use caution. Just because a marriage is non-consensual does not necessarily mean it is in the best-interest of the victim to annul the marriage. Indeed, take for instance the hypothetical cases of Harry and Susan: both are choosing to be married to avoid a negative consequence, as is their right to do under a theory of individual autonomy.

Another point of caution must be made in reference to the suggested definition of "coercion-based marriage." To include marriages that are procured by means of a coercive, positive

inducement is to expand the concept of non-consensual marriage significantly beyond the boundaries of the current understanding of valid marital consent. Some may even question whether under such a definition, *all* marriages might indeed be seen as involving some level of coercion. External pressures such as gender, socioeconomics, religion, and family expectations are certainly present in the lives of every person who marries, to varying extents. The line of what passes into a coercion-based marriage may therefore, for some, be hard to define.

However, there are two critical elements to the proposed definition that seek to constrain this understanding to cases where coercion is not merely present, but an overriding pressure for an individual to marry/remain married. First is the use of the word “extreme” in relation to external pressuring factors. This subjective terminology intends for an assessment to be made of the severity of external factors on the mindset of the consenting party and the effect of these factors on the giving of marital consent. Second, the definition requires that the other party to the marriage be aware of these extreme pressuring factors. Awareness of such severe factors affecting one’s partner’s ability to give free consent is highly significant in understanding the relational dynamics between the parties and how that dynamic might affect the giving and receiving of marital consent.

Moreover, even if the proposed definition of coercion-based marriage is uncomfortably broad for some, the challenge it presents to the collective understanding of valid marital consent adds significantly to the discourse on this issue. The definition intentionally pushes many marriages that society may not currently view as coercive under a lens of more intense scrutiny. Indeed, this definition may allow for a far more nuanced evaluation of marriage generally and its efficacy in the modern world. For example, in a society where specifically women had been highly socialized to seek marriage as a necessary economic relationship, does this economic dependence qualify as coercion to marry? And how then do modern marriages where the parties have more equal economic standing compare to such marriages? Are they somehow more legitimate by virtue of the parties’ economic equality? The proposed definitions of this chapter aim to help us in assessing such questions as family law evolves in the modern era.

To acknowledge that marriage is consented-to or remained in under duress or coercion does not create an automatic remedy. Instead, with these definitions, this thesis hopes to contribute to a

better baseline for the research and understanding of non-consensual marriage, both in the US and beyond, and in turn create more comprehensive and effective solutions.

3.2 Fraud

“If the subject of duress as a ground for the annulment of marriages be regarded as somewhat complicated, that of fraud is certainly confusion worse confounded.”

Having discussed force/duress/coercion, we move to another condition that may invalidate marital consent: fraud. As with cases related to annulment due to force/duress/coercion, there is significant difficulty in determining the numbers of annulment actions that are filed in the US on the basis of fraud.⁸⁵³ According to Abrams, “no one single marriage fraud test exists” and an array of legal doctrines across different areas of law address marriage fraud with differing standards.⁸⁵⁴

To attempt to understand this doctrine, we begin with an overview of the state law to examine the legislative language of marriage fraud. “Fraud” in relation to marriage has generally been addressed in state dissolution statutes, so these provisions were examined to identify common language and posturing. While this assessment confirms that the majority of states do allow for the annulment of a marriage on the basis of fraudulent inducement, like other such provisions discussed in previous chapters, there is little cohesion between legislative language and significant exceptions, such as for couples who have cohabitated.

After this legislative overview, we turn to an assessment of under which conditions courts have found marriages to be fraudulent. Two major themes emerge from this assessment. First is the historical trend of courts annulling marriages based on the fraudulent inducement of one party into a marriage by another, usually in cases related to sexual history/health and pregnancy. The second is the more modern discourse on marriage fraud, which involves the marriage of parties to “wrongfully” obtain marital benefits. It is argued that this second conceptualization of marriage fraud is legally unsound and should be eliminated from the current understanding of fraud that invalidates the legitimacy of a marriage.

⁸⁵³ See Chapter 1.1 for discussion of limitation on obtaining state dissolution statistics.

⁸⁵⁴ K Abrams, ‘Marriage Fraud’ (2012) 100 California Law Review 1.

Fraud and Marriage in US Family Law

The vast majority of US states allow for the annulment of a marriage upon a showing of “fraud.” The language of these statutes is significantly more uniform than the statutes related to force/duress/coercion. 31 state family law statutes expressly include “fraud” as a grounds for annulment.⁸⁵⁵ In addition, seven states do not enumerate fraud in their annulment statutes, but case law and secondary source materials indicate that it can form the ground for an annulment action.⁸⁵⁶ Three state statutes do not specifically list the grounds for annulment, but allow for the court to exercise discretion in voiding a marriage upon a finding of a condition that would affect the legitimate forming of the marriage agreement, which could presumably include a showing of fraud.⁸⁵⁷

As in the case of force/duress/coercion, many states include in their fraud annulment provisions an exception for couples that have cohabitated. In eight states, a party cannot claim fraud as a grounds for annulment if they have cohabitated with the other spouse after she has knowledge of the fraud.⁸⁵⁸ However, under the language of seven state statutes, a party who cohabitated with the other spouse at any point, regardless of when she became aware of the fraud, cannot annul the marriage on the basis of fraud.⁸⁵⁹ Montana and Wisconsin provide similar exceptions that are based on the timing of the provision, rather than the cohabitation: the petitioner must bring an action for annulment within a set time period after learning of the fraud in order to receive an annulment.⁸⁶⁰ West Virginia’s family code broadly prohibits annulment when “after knowledge of the facts, [the injured party] has by acts or conduct confirmed such marriage.”⁸⁶¹ As in the case of cohabitation exceptions for force/duress/coercion annulment, these provisions are likely based either in a concern for the sexual “purity” of the parties or a tenuous belief that if parties cohabitate, it is less likely that there was genuinely fraud in the inducement of the marriage. As discussed in Chapter 3.1, this reasoning is both archaic and not based in sound legal reasoning.

⁸⁵⁵ Alaska, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Washington, West Virginia, Wisconsin, Wyoming. Statute Compendium G.

⁸⁵⁶ Florida, Massachusetts, Missouri, New Hampshire, South Carolina, Tennessee. Statute Compendium G.

⁸⁵⁷ Arizona, Kansas, Louisiana. Statute Compendium G.

⁸⁵⁸ California, Idaho, Nevada, North Dakota, Ohio, Pennsylvania, South Dakota, Texas. Statute Compendium G.

⁸⁵⁹ Alaska, Hawaii, Michigan, Minnesota, Nebraska, South Carolina, Wyoming. Statute Compendium G.

⁸⁶⁰ Mon. Code § 40-1-402; Wis. Stat. § 767.313. Statute Compendium G.

⁸⁶¹ WV Code § 48-3-105. Statute Compendium G.

Fraudulent Inducement to Marriage

Turning to the court interpretations of these state laws, for much of the 19th and early 20th century, fraud in a marriage was seen as a contract issue, whereby misrepresentation by one party wrongfully induced another into a marriage and relief could only be sought by the injured party.⁸⁶² However, not all misrepresentations were considered serious enough to warrant an annulment. The English common law precedent established a high bar for what constituted such fraud, and the focus of the courts was not primarily on the actual inducement to the marriage.⁸⁶³ For instance, in *Moss v. Moss* the court found that a wife's concealment of her pregnancy by another man prior to the marriage did not warrant an annulment, as this misrepresentation did not affect the continued marital relationship of the parties.⁸⁶⁴ Under this common law standard, fraud that simply induces marital consent is not grounds for annulment; the misrepresentation must in some way affect the ongoing relationship.⁸⁶⁵

This precedent was reinterpreted in the US family law system in the seminal 1862 case, *Reynolds v. Reynolds*.⁸⁶⁶ There, under similar facts as *Moss*, the court found that a concealed pregnancy was sufficient to prove fraud for annulment. However, the court in *Reynolds* did not depart entirely from the rationale in *Moss*. The court did not void the marriage on the basis that the wife's fraud had wrongfully induced the husband's consent; rather they stated that the wife's pregnancy would affect the "essentials of the marriage" as an ongoing relationship for two primary reasons.⁸⁶⁷ First, the court reasoned that a pregnant woman would not be in a position to have regular intercourse with her husband, which they deemed as an essential element of the marriage.⁸⁶⁸ Second, they argued that the husband would have to "acknowledge the child is not his own", affecting his lineage and inheritance, which they also deemed essential to marriage.⁸⁶⁹

Since *Reynolds*, courts have categorized a large number of issues as "essential" or "not essential" to marriage for purposes of fraud evaluations. The essentiality of the fact at issue is not determined by the parties, but by the court itself. As Kingsley summarizes, since *Reynolds*, courts

⁸⁶² See *ibid* at 7.

⁸⁶³ See generally Brown (n 768); R Kingsley, 'Fraud as a Ground for Annulment of a Marriage' (1945) 18 Southern California Law Review 165.

⁸⁶⁴ *Moss v Moss* (1897) 263 P (England).

⁸⁶⁵ See Brown (n 768) at 480.

⁸⁶⁶ *Reynolds v Reynolds* (1862) 3 Allen 605 (Massachusetts).

⁸⁶⁷ *ibid*.

⁸⁶⁸ *ibid*.

⁸⁶⁹ *ibid*.

have asked, “Did the misrepresentation, in addition to being an inducement in fact, relate to facts which the law deems of sufficient significance to merit interference with an established status of public concern?”⁸⁷⁰ The only cases where courts have consistently determined that the fraud goes to the “essentials” of the marriage is where the misrepresentation is related to procreation and/or sexual intercourse.⁸⁷¹ Following *Reynolds*, courts have widely approved annulments in cases where the wife concealed a pregnancy by another man prior to the marriage.⁸⁷² In addition, concealment of a venereal disease⁸⁷³ or known infertility⁸⁷⁴ have regularly been determined to be sufficient grounds for such an annulment.

Courts have concluded that it is not even necessary for a party to make a willful misrepresentation of sexual capacity in order to amount to fraud, as “implicit in the marriage contract is the representation that the parties will have normal and natural relations and that they will not do anything which will frustrate the normal and natural result of those relations.”⁸⁷⁵ However, only misrepresentations that relate to an ongoing ability to engage in sexual intercourse have been widely held as “essential” to marriage; prior sexual conduct that does not interfere with sex within the marriage does not seem to meet this standard. Even in an era where “chastity”, particularly for women, was extremally valued, courts still held that a misstatement of one’s sexual history was not sufficient grounds for an annulment.⁸⁷⁶ Courts have even traditionally denied annulment in cases where a false claim of pregnancy induced the marriage, finding that in such a case a “wife is not even temporarily incapacitated from her marital obligations”, and therefore the misrepresentation does not affect the “essentials” of the marriage.⁸⁷⁷

⁸⁷⁰ Kingsley (n 863).

⁸⁷¹ See *Abrams* (n 854) at 8.

⁸⁷² See eg. *Baker v Baker* (1859) 13 Cal 87 (California); *Morris v Morris* (1940) 13 Atl 2d 603 (Delaware); *Lenoir v Lenoir* (1904) 24 App DC 160 (District of Columbia); *Ritter v Ritter* (1839) 5 Blackf 81 (Indiana); *Nadra v Nadra* (1890) NW 44 1046 (Michigan); *Carris v Carris* (1873) 24 NJ Eq 516 (New Jersey); *Fontana v Fontana* (1912) 77 Misc 135 (New York); *Harrell v Harrell* (1897) 42 SW 1040 (Texas Court of Appeals).

⁸⁷³ See eg. *Ryder v Ryder* (1894) 28 Atl 1029 (Vermont); *Crane v Crane* (1901) 49 Atl 734 (New Jersey); *C v C* (1914) 148 NW 865 (Wisconsin); *Jacobson v Jacobson* (1923) 202 NY Supp 96 (New York Appellate Court); *Svenson v Svenson* (1904) 70 NE 120 (New York); *Meyer v Meyer* (1875) 49 How Or 311 (New York).

⁸⁷⁴ See eg. *Vileta v Vileta* (1942) 128 Pac 2d 376 (California Court of Appeals); *Mutter v Mutter* (1906) 124 Am St Rep 381 (Kentucky); *Osborne v Osborne* (1937) 191 Atl 783 (New Jersey); *Williams v Williams* (1939) 11 NYS 2d 611 (New York).

⁸⁷⁵ *Gerwitz v Gerwitz* (1945) 66 NYS 2d (New York Appellate Division); see also *Maslow v Maslow* (1953) 255 P2d 65 (California Court of Appeals).

⁸⁷⁶ See eg. *Steele v Steele* (1895) 29 SW 17 (Kentucky).

⁸⁷⁷ See *Kingsley* (n 863) at 166.

Likewise, early courts determined that misstatements of romantic or marital history do not affect the essential elements of a marriage.⁸⁷⁸ Especially in cases where the marrying couple has themselves engaged in sexual intercourse, courts have been unwilling to annul the marriage, even in cases of serious misrepresentations. For instance, in a case where a man claimed that he was fraudulently induced to marry a woman because she claimed to be carrying his child, the court denied relief stating:

Can a man who has been guilty of one of the grossest acts of immorality expect any court to undo the toils which envelope him because of such immorality? I think not. He transgressed; and this transgression blinded him; otherwise too, he would have been free from importunities to marry, and from all false statements as to his liabilities.⁸⁷⁹

We can generalize that courts will annul marriages where there is some misrepresentation or concealment of sexual capacity but will not annul for cases of prior sexual conduct.

Outside of issues related to sexual intercourse and procreation, courts have been highly redescent to grant annulments due to fraud. Courts have routinely denied annulments on the basis of concealment of non-venereal medical conditions,⁸⁸⁰ including mental illness.⁸⁸¹ A myriad of other misrepresentations have also been deemed “not essential”, including misstatements about one’s age,⁸⁸² financial/social status,⁸⁸³ religion⁸⁸⁴, or citizenship.⁸⁸⁵ As summarized by the court in *Nerini v. Nerini*, “Fraudulent misrepresentations...as to birth, social position, good fortune, and temperament cannot...vitiate [a marriage].”⁸⁸⁶ Courts have likewise almost uniformly prohibited annulment for any misrepresentations regarding personal characteristics or emotions.⁸⁸⁷ Certainly,

⁸⁷⁸ See eg. *Hull v Hull* (1915) 191 Ill App 307 (Illinois); *Clarke v Clarke* (1860) 11 Abb Pr 228 (New York)(where the court called the wife's indignation at her husband's concealment of a prior divorce a "mere fancy.")

⁸⁷⁹ *States v States* (1893) NJ Eq 195, 196 (New Jersey).

⁸⁸⁰ See eg. *Lyon v Lyon* (1907) 82 NE 850 (Illinois); *Richardson v Richardson* (1923) 140 NE 73 (Massachusetts); *Lapides v Lapides* (1930) 171 NE 911 (New York).

⁸⁸¹ See eg. *Robertson v Roth* (1925) 204 NE 329 (Minnesota); *Cumington v Belchertown* (1889) 21 NE 436 (Massachusetts); *Lewis v Lewis* (1890) 46 NW 323 (Minnesota); *Allen v Allen* (1915) 95 Atl 363 (New Jersey).

⁸⁸² See eg. *Quigg v Quigg* (1903) 42 Misc 48 (New York); *Williams v Williams* (1911) 71 Misc 590 (New York).

⁸⁸³ See eg. *Wier v Still* (1870) 31 Ia 107 (Iowa); *Meyer v. Meyer* (n 873); *Jakar v Jakar* (1920) 102 SE 337 (South Carolina); *Williams v Williams* (1922) 118 Atl 638 (Delaware); *Woodward v Heichelbeck* (1925) 128 Atl 169 (New Jersey); *Marshall v Marshall* (1931) 300 Pac 816 (California).

⁸⁸⁴ See eg. *Beckley v Beckley* (1904) 115 Ill App 27 (Illinois).

⁸⁸⁵ See eg. *Kawabata v Kwabata* (1922) 189 NW 237 (North Dakota).

⁸⁸⁶ *Nerini v Nerini* (1943) 11 Conn Supp 361, 365 (Connecticut Superior Court).

⁸⁸⁷ See eg. 9/26/25 4:27:00 PM; *Jakar v. Jakar* (n 883); *Williamson v Williamson* (1910) 34 App DC 536 (District of Columbia).

courts have found that feigning love for one's partner to induce marriage does not amount to fraud.⁸⁸⁸ In one such case, *Beckley v. Beckley*, a husband filed for annulment based on the wife's misrepresentation of her affections for him, as well as her false claims of being a Sunday school teacher and a member of a local church.⁸⁸⁹ After the marriage, she threatened to kill him if he did not sell her his house and threw him out of the residence. The court there bluntly stated, "There was neither fraud, error or duress as known to law...He got possession of the same flesh and bones he bargained for...the marriage was consummated; they lived together as husband and wife; they are husband and wife."⁸⁹⁰

However, some case exceptions make these seemingly brightline standards unclear. For instance, in *O'Connell v. O'Connell* an annulment was approved on the basis that the husband had concealed a history of drug addiction and a violent temper. The court stated, "It would be a cruel injustice to compel the [wife] to go through life bound by ties of marriage to a dope fiend past all hope of redemption, where it so clearly appears that she was induced to contract such alliance by fraud and deceit."⁸⁹¹ This reasoning clearly acknowledges that the husband's behavior and temperament were the misrepresentations that induced the marriage, typically not sufficient to prove fraud, and yet the court still voided the union.⁸⁹² When looking at historical annulment cases, it is important to note that judicial reasoning is likely tied to pragmatic concerns, rather than simply statutory interpretation. No-fault divorce was not widely available throughout the US until the 1980s, and many spouses wanting to leave a marriage could not do so without a finding of fault.⁸⁹³ It is highly likely that judges, concerned with spouses in unhappy marriages, more liberally applied the standards of annulment and fault divorce than modern judges might do. Indeed, concern for the wife's ongoing safety and happiness seems to be a predominant concern in cases such as *O'Connell*, rather than specific details of how the marriage was induced.

Despite some conflicting precedent, case history of annulments for fraud during the 1800s and 1900s show a wide acceptance of the *Reynolds* test and a fairly uniform criteria of what was deemed to be "essential" in a marriage by family courts: primarily the ability to engage in

⁸⁸⁸ See eg. *Schaeffer v Schaeffer* (1913) 160 App Div 48 (New York); *Griffen v Griffen* (1924) 122 Misc 837 (New York); *Saltzberg v Saltzberg* (1931) 153 Atl 605 (New Jersey).

⁸⁸⁹ *Beckley v. Beckley* (n 884).

⁸⁹⁰ *ibid* at 28.

⁸⁹¹ *O'Connell v O'Connell* (1922) 194 NY Supp 265 (New York Appellate Division).

⁸⁹² See L Emmerglick, 'Nullity of Marriage for Fraud' 19 Kentucky Law Journal 295.

⁸⁹³ The advent of no-fault divorce in the US is discussed in detail in the next chapter.

“normal” sexual intercourse and to create legitimate heirs. If the spouses could engage in productive sexual relations, courts were largely unconcerned with any other misrepresentation, even if such a marriage resulted in massive dissatisfaction for one of the parties. These precedents show little concern for the conditions affecting the consent of the parties in entering the marriage and instead a concern for conditions that the state deemed critical to the institution of marriage.

However, there were several notable departures from the *Reynolds* “essentials” test in the early 20th century. For instance, in *Gatto v. Gatto*, a husband was permitted to seek an annulment from his wife, who had been the victim of incestuous rape, on the basis that he married her under the belief that she was a virgin.⁸⁹⁴ There, the court expressly moved away from the strict *Reynolds* “essentials” test stating:

The fraud on account of which the marriage will be set aside must relate to a matter material to the marriage relation which the defrauded party could not, in the exercise of reasonable prudence, discover at the time, and the effect of which he has not waived when fully informed of it, is a principle readily deductible from many American authorities. It is not exclusively confined to the essentials of the marriage relation as defined in the *Reynolds* case.⁸⁹⁵

Family courts in New York have also been markedly more willing to shift focus from the “essentials” of a marriage to the mindset of the parties when they consented to the marriage. For instance, in *DiLorenzo v. DiLorenzo* the court reached the same conclusion in *Reynolds* to annul a marriage where the wife falsely represented that her child was her husband’s biologically, but its reasoning differed entirely from the reasoning in *Reynolds*.⁸⁹⁶ Where the *Reynolds* court based its holding on the disruption pregnancy would have on sex within the marriage and the ultimate issue of legitimacy of the child, the court in *DiLorenzo* instead voided the union on the basis that the wife’s lie had falsely induced consent from the husband. Because the woman deceived the man into believing he was the father of her child, the court concluded that “the minds of the

⁸⁹⁴ *Gatto v Gatto* (1919) 106 Atl 493 (New Hampshire).

⁸⁹⁵ *ibid.*

⁸⁹⁶ *DiLorenzo v Di Lorenzo* (1903) 67 NE 63 (New York Court of Appeals).

parties did not meet on a common basis of operation.”⁸⁹⁷ Later, in *Shonfeld v. Shonfeld*, the New York court conclusively moved away from *Reynolds* and held that annulment for fraud requires only proof that the representations were such to deceive an ordinarily prudent person, who otherwise would not have consented to the marriage.⁸⁹⁸ This standard does not require that the misrepresentation be related to an element that has arbitrarily been deemed “essential” by the court; instead, we must simply ask if the fraud would have caused a reasonable person to enter the marriage.

As a result of precedents such as *DiLorenzo* and *Shonfeld*, New York family courts have been able to more liberally apply the annulment for fraud doctrine. For instance, while jurisdictions strictly following the *Reynolds* standard routinely concluded that only venereal illness affected the “essentials” of a marriage, New York courts have found that a party could be wrongfully induced to a marriage if the other spouse concealed a myriad of conditions, including heart disease,⁸⁹⁹ eye conditions,⁹⁰⁰ and even mental illness.⁹⁰¹ However, these precedents could just as easily be interpreted as a continuation for a concern for procreation, as such conditions could be hereditary and affect offspring.⁹⁰² Indeed, New York courts continued to decide cases with a conflated mix of the *DiLorenzo/Shonfeld* and *Reynolds* parameters. Take for example the results in two cases related to a misstatement of education and social position. In *Cervone v. Cervone*, the court denied an annulment to a wife who asserted that she was fraudulently induced to marry her husband by his wrongful claim that he was a doctor.⁹⁰³ Yet, the same court, just two years later, granted an annulment to a wife who claimed to have been fraudulently induced to marry by her husband’s false representation that he was a university professor.⁹⁰⁴ Such inconsistencies are rife throughout annulment for fraud jurisprudence, making the application of the doctrine difficult to concretely summarize.

⁸⁹⁷ *ibid.*

⁸⁹⁸ *Shonfeld v Shonfeld* (1933) 184 NE 60 (New York); *see also* ‘Fraud and Annulment in New York’ (1941) 41 Columbia Law Review 475 at 503.

⁸⁹⁹ *See eg. Licato v Licato* (1937) 164 Misc 105 (New York Superior Court).

⁹⁰⁰ *See eg. August v August* (1937) 1 NYLJ 1436 (New York Superior Court).

⁹⁰¹ *See eg. Alter v Alter* (1937) 294 NY Supp 195 (New York Appellate Division); *Levinson v Levinson* (1939) 4 NYLJ 1305 (New York Superior Court).

⁹⁰² *See* ‘Fraud and Annulment in New York’ (n 898) at 507-508.

⁹⁰³ *Cervone v Cervone* (1935) 280 NY Supp 159 (New York Superior Court).

⁹⁰⁴ *Anon v Anon* (1937) 7 NYLJ 814 (New York Superior Court).

In more modern cases, courts still apply the *Reynolds* test but have seemingly broadened the factors that are seen as essential to marriage. For instance, the court in *Wolfe v. Wolfe* highlighted the subjective nature of the *Reynolds* standard, stating that an “essential” element of marriage “cannot be expressly delineated, for what is essential to one marriage may not be equally significant to another.”⁹⁰⁵ In a standard more similar to the court’s reasoning in *Shonfeld*, the *Wolfe* court found that the proper analysis in determining if the marriage could be annulled was to ask whether “the marriage would not have occurred but for the fraud.”⁹⁰⁶ The court did not however completely abandon *Reynolds*-based reasoning, finding that misstatements of “fortune, character, and social standing” would still be insufficient to annul for fraud.⁹⁰⁷ However, misrepresentations that went to more than “mere subjective, personal aversion” in the offended spouse could satisfy the *Reynolds* “essentials” test.⁹⁰⁸

In another case departing from the strict standards of *Reynolds* precedent, *Farr v. Farr*, the court granted an annulment to a woman who claimed to have been induced to re-marry her ex-husband by his fraudulent assertion that he was dying of a terminal illness.⁹⁰⁹ There, the court stated that “there was ample evidence that the wife decided to remarry him only because she believed his death was imminent. Thus, the record supports the finding that, at least as to these parties, the misrepresentation did go to the essence of their remarriage.”⁹¹⁰ The court did not provide more explanation of the word “essence”, and its choice of wording indicates the court intentionally did not depart far from the *Reynolds* standard. Nevertheless, the court’s concern with the state of mind of the wife in giving her consent to remarry is similar to the standard seen in *DiLorenzo* and *Shonfeld*.

However, other modern cases have more stringently upheld the *Reynolds* “essentials” test and its traditional emphasis on sexual relations. For instance, in the 2005 case, *Meagher v. Maleki*, the court overturned an annulment that had been granted on the basis of the husband’s misrepresentation of his financial status.⁹¹¹ There, the court stated definitively that annulment for

⁹⁰⁵ *Wolfe v Wolfe* (1979) 389 NE2d 1143 (Illinois Supreme Court); see also J Grossman, ‘Annulments Based on Fraud: What Is the Essence of a Marriage?’ [2010] *FindLaw Legal Commentary*.

⁹⁰⁶ *Wolfe v. Wolfe* (n 905).

⁹⁰⁷ *ibid*.

⁹⁰⁸ *ibid*.

⁹⁰⁹ *In re the Marriage of Joy Lynn Farr, and Larry Allen Farr* (2010) No. 09CA0238 (Colorado Court of Appeals).

⁹¹⁰ *ibid* at 9.

⁹¹¹ *In re Marriage of Meagher & Maleki* (2005) 31 Cal Rptr 3d 663 (California Court of Appeals).

fraud was only appropriate where the misrepresentation “relates to a matter which the state deems vital to the marriage relationship” and that only matters related to sexual intercourse and procreation have consistently met this standard.⁹¹² The court reasoned that:

In the absence of fraud involving the party's intentions or abilities with respect to the sexual or procreative aspect of marriage, the long-standing rule is that neither party may question the validity of the marriage upon the grounds of reliance upon the express or implied representations of the other with respect to such matters as character, habits, chastity, business or social standing, financial worth of prospects, or matters of similar nature.⁹¹³

So where does this winding precedential history leave the doctrine of annulment for fraud? With the advent of no-fault divorce, far fewer couples need to seek this remedy to terminate their unions.⁹¹⁴ For those that do, it appears that courts will continue to apply the *Reynolds* “essentials” analysis. In most cases, this will require a showing that the fraud related directly to an issue of sexual intimacy or procreation. However, it is possible that courts will consider other misrepresentations as going to the “essence” of a marriage, and therefore grounds for a claim of fraud. What is clear is that, despite some limited decisions such as *Gatto*, *DiLorenzo*, and *Shonfeld*, courts will not show great concern for the mental state of the parties in consenting to the marriage. In short: *what* is misrepresented is of far greater importance to family courts than *how* the misrepresentation affected the giving of marital consent.

Fraud and Marriage in US Benefits Law

We move now to another, perhaps even more challenging, dimension of “marriage fraud” discourse: fraud not as an issue of fraudulent inducement to marriage, but as the fraudulent receiving of marital benefits. Traditionally, courts had upheld what are known as “limited purpose” marriages, where parties married only for a specific purpose.⁹¹⁵ The most common limited purpose marriage was one where the parties married specifically to “legitimate” a child

⁹¹² *ibid.*

⁹¹³ *ibid.*

⁹¹⁴ No-fault divorce is discussed in detail in Chapter 3.3.

⁹¹⁵ *See eg.* *Abrams* (n 854) at 12.

born out of wedlock, where courts reasoned that to deny marriage legitimacy in such cases “would destroy the dignity and lessen the importance of marriage.”⁹¹⁶

The expansion of the administrative state throughout the late 19th and 20th centuries equated to a correspondingly wide breadth of benefits attached to marriage.⁹¹⁷ This expansion of marriage-based benefits suddenly brought the limited purpose marriage under extreme scrutiny. Courts and administrative agencies became increasingly panicked that a couple may decide to marry for the sole purpose of receiving a benefit, without meeting some threshold of legitimacy. As summarized by Abrams, “Courts have increasingly found themselves playing the role of ‘marriage police’ trying to determine whether a couple is ‘really’ married or whether, instead, the couple married solely for the extensive benefits attached to marriage.”⁹¹⁸ The obvious question arises: what makes a couple “really” married? From a simple legal perspective, the answer is an easy one: a couple is married when they have followed the proper procedure and obtained a valid marriage license from the state. However, in the case of marital benefits, state agencies have often not deemed this simple answer to be sufficient.

While a small number of administrative benefits require only a “formal marriage”, such as IRS tax filings and health insurance, many require a more expansive showing of additional factors of marital legitimacy.⁹¹⁹ Abrams suggests three alternative approaches that have been implemented by the state in this context: the “marriage plus” test, the “functional marriage” test, and the “integrated” marriage test. Under the “marriage plus” test, agencies such as the Veterans Administration and Social Security Administration considers additional factors in conjunction with the issuance of a marriage license, such as the relative age of the parties, the length of the relationship, cohabitation, or shared children.⁹²⁰ The “functional marriage” test takes this evaluation a step further, where the actual existence of a marriage license is secondary: it is how the couple acts that is determinative of the marital relationship.⁹²¹ Similar to the now-defunct common law marriage doctrine, the functional marriage test focuses on certain behaviors, often

⁹¹⁶ *Hanson v Hanson* (1934) 191 NE 673 (Massachusetts); see also *DeVries v DeVries* (1915) 194 Ill App 4 (Illinois Court of Appeals).

⁹¹⁷ See generally K Collons, ‘Administering Marriage: Marriage-Based Entitlements, Bureaucracy and the Legal Construction of the Family’ (2009) 62 Vanderbilt Law Review 1085.

⁹¹⁸ Abrams (n 854) at 5.

⁹¹⁹ See *ibid*.

⁹²⁰ *ibid* at 19.

⁹²¹ *ibid* at 26.

sexual relations, between the parties, to determine if they share a valid marital relationship. Finally, combining the “marriage plus” and “functional marriage” tests, Abrams suggests that the “integrated” marriage test requires a complete showing of a wide array of legitimacy factors, including a valid marriage certificate, “plus” factors, and a demonstration of continued behavior that is deemed representative of a marital relationship.⁹²²

The most striking examples of this “integrated” test are the extensive requirements for family-based US immigration petitions. The evolution of US immigration law is a long and complex process, which will not be discussed in detail here. However, in order to assess the conventional understanding of marital fraud in the US, we must look briefly at immigration, as perhaps no other marital benefit has received such intense scrutiny as the so-called “spousal visa”. As discussed in Chapter 1.3, the conflagration of xenophobia and claims of non-consensual marriage have been present throughout US history, particularly against immigrant communities in the 19th and early 20th centuries. As a result, the “War Brides Act”,⁹²³ originally designed to allow veterans to bring over spouses that they met during overseas deployments, came under extreme scrutiny.⁹²⁴ The fear of “fraudulent marriages” under the Act was specifically addressed in the Supreme Court case, *Lutwak v. US*.⁹²⁵ There, the defendants had been convicted of conspiracy to defraud the US immigration system by creating a plan to marry two US veterans to Polish immigrants to secure them access to the United States. While the marriages were lawfully performed, the Court upheld the convictions stating:

We do not believe that the validity of the marriages is material... We consider the marriage ceremonies only as a part of the conspiracy to defraud the United States... The common understanding of a marriage, which Congress must have had in mind when it made provisions for ‘alien spouses’ in the War Brides Act, is that the two parties have undertaken to establish a life together and assume certain duties and obligations.⁹²⁶

⁹²² *ibid* at 30.

⁹²³ War Brides 1945, 59 Stat. 659.

⁹²⁴ For more information on “war brides” and the history of spousal immigration in the US, see generally The National WWII Museum, ‘Coming To America: The War Brides Act of 1945’ (28 December 2020) <<https://www.nationalww2museum.org/war/articles/war-brides-act-1945>>.

⁹²⁵ *Lutwak v United States* (1953) 344 US 604 (US Supreme Court).

⁹²⁶ *ibid*.

Justice Jackson, however, strongly dissented against the ruling, arguing that the Court improperly focused on the motivations for the marriages, rather than the legality of the unions themselves. He stated definitively, “Marriages of convenience are not uncommon, and it cannot be that we would hold it a fraud for one who has contracted a marriage not forbidden by law to represent himself as wedded even if there were grounds for annulment or divorce and proceedings to that end were contemplated.”⁹²⁷

Nevertheless, concerns over “sham” marriage for purposes of immigration continued through the 20th century, culminating in a series of revisions to the Immigration and Naturalization Act (INA) throughout the 1980s, in particular the Immigration Marriage Fraud Amendments (IMFA) of 1986.⁹²⁸ Under the INA, citizens (and in some cases permanent residents) can sponsor their spouse to obtain legal status in the US, and it remains one of the most expedient paths to legal entry into the country.⁹²⁹ However, the INA contains clear language against the issuance of such a visa when the marriage was entered into solely for the purpose of immigration benefits stating:

[N]o petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.⁹³⁰

The significant benefits of the spousal visa have continually drawn skepticism from lawmakers, such as Representative Romano L. Mazzoli who claimed that, “Because spouses of U.S. citizens

⁹²⁷ *ibid* at 621 (Justice Robert Jackson, dissenting).

⁹²⁸ Immigration and Nationality Act 1952, 8 U.S.C. § 1158 (hereinafter INA); Immigration Marriage Fraud Amendments 1990, 8 U.S.C. § 1186a, Supp II (hereinafter IMFA).

⁹²⁹ For instance, as of time of writing, the estimated processing time for a spousal filed by a US visa citizen is just 16.5 months, while the wait time to obtain a visa for other family relations, such as adult children or siblings, is as much as 20 years. *See* US Department of State, ‘Visa Bulletin March 2025: Final Action Dates for Family-Sponsored Preference Cases’ (accessed 3 March 2025), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2025/visa-bulletin-for-march-2025.html>.

⁹³⁰ INA § 1154(A)(2)(c) (“Limitation on orphan petitions approved for a single petitioner; prohibition against approval in cases of marriages entered into in order to evade immigration laws; restriction on future entry of aliens involved with marriage fraud.”)

and permanent resident aliens are . . . given special consideration under our immigration laws, many aliens who would not otherwise be allowed to live in the United States find it expedient to enter into a fraudulent marriage.”⁹³¹ Testifying before the Senate Subcommittee Hearing on Immigration and Refugee Policy in the IMFA, Immigration and Naturalization Service (INS) Commissioner Alan C. Nelson, stated that marriage fraud posed “significant threats to the integrity of lawful immigration procedures” and that “based on a preliminary survey . . . we believe as much as 30 percent, which is an extremely high figure, of the spouse relationships may be fraudulent.”⁹³² This shocking statistic was, however, untrue: the INS later admitted to the invalidity of Commissioner Nelson’s survey estimating that one-third of immigration marriages were fraudulent.⁹³³

Despite debate over the actual extent of fraud in marriage-based immigration petitions, the IMFA passed quickly through Congress.⁹³⁴ Under the original conditions of the INA, spousal petitions required evidence of a “legitimate” marital relationship that can be interrogated by an immigration officer prior to the issuance of the visa.⁹³⁵ The IMFA created an additional barrier called “conditional status”, where an incoming immigrant must apply for a spousal visa that lasts only two years and can then be renewed in an additional application by both the sponsoring and immigrant spouse.⁹³⁶ The couple must at that stage undergo another interview with an immigration officer, who will need to judge that the marriage is “valid”, meaning that it was not entered into solely for the purposes of procuring immigration benefit.”⁹³⁷

The IMFA and its legacy on the US immigration system has faced significant pushback from advocacy groups and immigration scholars, particularly for its allegedly disproportionate penalization of Asian women and victims of domestic violence. Wang, for instance, argues that:

⁹³¹ 132 Congressional Hearing H27,015 (daily ed. Sept. 1, 1986) (statement of Rep. Romano L. Mazzoli).

⁹³² Immigration Marriage Fraud: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 2 (1985) (Statement of INS Commissioner Alan C. Nelson); *see also* J Jones, ‘The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?’ (1997) 24 Florida State University Law Review 679.

⁹³³ *See* Z DiDomenico, ‘Engaged in Fraud: Detecting Sham Marriages within the Bounds of the Constitution’, (2023) 72 DePaul Law Review 703 at 710 (citing Jones (n 932)).

⁹³⁴ *See* LA S Wang, ‘Of the Law, But Not Its Spirit: Immigration Marriage Fraud as Legal Fiction and Violence against Asian Immigrant Women’ (2013) 3 University of California Irvine Law Review 1221.

⁹³⁵ INA § 1154, ‘Procedure for granting immigrant status’.

⁹³⁶ IMFA §1186a(a)(1) (1994); 1186a(b)(1).

⁹³⁷ *ibid* §1186a(c)(2)(A).

Marriage fraud is not a racial misrepresentation of immigrant women but is instead a legal fiction, an invention of law that defines the subject of fraud as one who desires citizenship rather than the ‘bonafide’ love of a citizen spouse... Immigrant women are innocent of fraud only if they can match their love to that of their spouse and deny any articulation of self love.⁹³⁸

Jones shares the view that the concern for “marriage fraud” is overblown stating, “Although designed to deter marriage fraud, the IMFA has become a weapon for oppressing alien spouses and children. The underlying premise of the IMFA—that thirty percent of alien spouses marry U.S. citizens solely to gain citizenship—has been deemed incorrect and even fraudulent.”⁹³⁹ Park criticizes not just the IMFA, but the INA’s entire understanding of marriage fraud stating, “The [INS] fraud criteria reveal the INS’ limited perception of what constitutes a typical fraudulent marriage” and that this perception is unfairly biased against women of Asian and Pacific Island descent, whose cultural marriage practices often differ significantly from Western standards.⁹⁴⁰ She goes on to find that “INS actions result in grave consequences specifically to Asian and Pacific Islander women. The INS’ preoccupation with combatting sham marriages is misdirected and futile.”⁹⁴¹ O’Herron expanded on these concerns to all women facing domestic violence, finding that the IMFA’s focus on weeding out “sham” marriages discouraged immigrant victims from coming forward stating, “The INA adds to problems created by the behavior patterns of batterers, cultural norms, and lack of access to good information to make it extremely unlikely that battered immigrant women will seek help.”⁹⁴²

The IMFA was replaced in large part by the Immigration Act of 1990, which included additional protections for immigrant spouses facing abuse from their sponsor and these protections were expanded with the passing and expansion of the Violence Against Women Act (VAWA)

⁹³⁸ Wang (n 934) at 1224.

⁹³⁹ J Jones, ‘The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?’ (1997) 24 Florida State University Law Review 679 at 701.

⁹⁴⁰ A Park, ‘The Marriage Fraud Act Revised: The Continuing Subordination of Asian and Pacific Islander Women’ (1993) 1 Asian American Pacific Islands Law Journal 29 at 43.

⁹⁴¹ *ibid* at 49.

⁹⁴² M O’Herron, ‘Ending the Abuse of the Marriage Fraud Act’ (1993) 7 Georgetown Immigration Law Journal 549 at 559.

throughout the 1990s.⁹⁴³ The INS itself was dismantled in 2002, with the United States Citizens and Immigration Services (USCIS) taking over responsibilities for immigration service functions in 2003.⁹⁴⁴ However, intense scrutiny of “sham marriages” has remained a central concern for USCIS. The agency continues to follow the standards laid out in *Bark v. INS*, which determined that a couple seeking a spousal visa must provide evidence that they intend to “establish a life together.”⁹⁴⁵ Such evidence will be submitted first with the initial immigration petition, including documentary evidence such as proof of combined finances, proof that the spouses live together, and/or proof that the spouses have children together.⁹⁴⁶ Second, the spouses will be subject to a joint interrogation on the validity of the marriage at an interview with a reviewing officer, and if deemed necessary, another, more intense, interview with the spouses separated, known as a “Stokes” interview.⁹⁴⁷

Concerningly, no specific guidelines are provided for how reviewing officers should determine if a marriage is “legitimate” at these interviews. For instance, the USCIS Adjudicator’s Field Manual instructs that examiners should ask questions to elicit “discrepancies in statements on questions for which a husband and wife should have common knowledge” but does not define what information they “should” have.⁹⁴⁸ It is left to the officer’s own discretion to determine if the couple’s relationship seems “real” or whether it is a “sham” marriage. This nebulous standard for determining marriage fraud is concerning for a number of reasons. Firstly, it is highly subjective, as the interviewing officer is left to decide, based on his own judgement, whether the couple intends to “establish a life together.” As discussed throughout this thesis, there is little legal consensus on what constitutes a “legitimate” marriage or what motivations are proper when entering a marriage. To ask USCIS officers to come to these conclusions independently opens such decisions up to highly subjective and unevenly applied standards.

⁹⁴³ See USCIS, ‘Abused Spouses, Children and Parents’ (accessed 3 March 2025), <https://www.uscis.gov/humanitarian/abused-spouses-children-and-parents> (discussing the VAWA self-petition and its requirements).

⁹⁴⁴ See ‘Policy Manual: Volume 1- General Policies and Procedures’ (USCIS 2025) Part A: Public Services-Chapter 1: Purpose and Background.

⁹⁴⁵ *Bark v Immigration and Naturalization Service* (1975) 511 F2d 1200 (United States Court of Appeals, Ninth Circuit) at 1202.

⁹⁴⁶ See USCIS, ‘Instructions for Form I-130, Petition for Alien Relative, and Form I-130A, Supplemental Information for Spouse Beneficiary’ (2024) OMB No. 1615-0012.

⁹⁴⁷ This interview procedure arises from the seminal case *Stokes v Immigration and Naturalization Services* (1975) 393 F Supp 24 (US District Court for the Southern District of New York).

⁹⁴⁸ *Abrams* (n 854) at 34.

Courts have tried to pin down more concretely the requirements for a valid marriage for purposes of a spousal visa petition, with varying results. For instance, the court in *US v. Tagalicud* found that motive to marry in order to receive immigration benefits is “at most of evidence of intent of marriage fraud but does not in itself make the marriage a sham.”⁹⁴⁹ The court in *Tagalicud* was less concerned with the motivations of the party in entering the marriage, but rather their intent to remain together after the issuance of the visa.⁹⁵⁰ In another, more recent case, *US v. Orellana-Blanco*, the court found that “trading” an agreement to perform marital duties in exchange for a visa was permissible, but failure to perform such duties once a visa is issued is not.⁹⁵¹ The court defines “marital duties” as responsibilities such as mowing the lawn, cleaning the house, and laying carpet.⁹⁵² The court does not clearly define if the performance of such domestic labor is a requirement for the showing of validity in all marriages, but the listing of such tasks as indicative of a marital relationship is puzzling, as such tasks will certainly not apply to all households. In another deeply perplexing case, *Surganoca v. Holder*, the court concluded that a marriage was “fraudulent” for purposes of immigration because the spouses did not live together.⁹⁵³ However, the parties demonstrated that they spent “two to four nights a week together”, had regular sexual intercourse, and were only living separately for a limited time due to the small size of the family apartment and the illness of another family member.⁹⁵⁴ Yet the court, concluded that such evidence was insufficient to prove the legitimacy of the marriage.⁹⁵⁵

Cases such as those discussed above have done little to clarify when and how the validity of a marriage should be ascertained by immigration officers and seemingly any personal standard could be applied in the denial of a spousal visa. Other courts have indeed expressed skepticism of the level of discretion given to immigration review officers. For instance, in *Chan v. Bell* the court stated that the “INS has no expertise in the field of predicting the stability and growth potential of marriages—if indeed anyone has—and it surely has no business operating in that field.”⁹⁵⁶ The court in *Dabaghian v. Civiletti* expressed similar sentiment and a “concern about

⁹⁴⁹ *US v. Tagalicud* (1996) 84 F3d 1180 (9th Circuit) at 1185

⁹⁵⁰ *ibid.*

⁹⁵¹ *US v. Orellana-Blanco* (2002) 294 F3d 1143 (9th Circuit).

⁹⁵² *ibid.* at 1152.

⁹⁵³ *Surganoca v. Holder* (2010) 612 F3d 901 (7th Circuit).

⁹⁵⁴ *ibid.* at 904.

⁹⁵⁵ *ibid.*

⁹⁵⁶ *Chan v. Bell* (1978) 464 F Supp 124 (US District Court for the District of Columbia) at 130.

potentially intrusive questioning that examiners might conduct to see if the marriage were still alive."⁹⁵⁷

The second issue in this discretionary interview process is its conflict with the constitutional principles of marital privacy. As discussed in Chapter 2.3, there is debate on whether substantive due process requires an unfettered right “to marry” or “to marriage”, the latter of which seems to fall squarely under the Court’s right to privacy precedent. If legal marriage does indeed create a zone of privacy into which the government can do little to interfere, the interrogation of marital legitimacy through the immigration process threatens to destroy this privacy. Immigration officers routinely ask questions that relate to the couple’s living conditions and personal habits, all of which would seem to be matters private to the family. While interviewers have increasingly been discouraged about asking direct questions related to the sexual acts between the parties, reports indicate that they routinely ask questions related to the intimacy of the couple, such as dating, courtship, and even “what side of the bed does your spouse sleep on?”⁹⁵⁸ As summarized by Tucker, “Rarely has any single legislative enactment raised as many broad constitutional concerns as the IMFA.”⁹⁵⁹ DiDomenico likewise finds that “the IMFA is an unconstitutional abuse of power over immigration by the United States government by infringing on the right to marital privacy.”⁹⁶⁰ While, as stated above, the IMFA itself is no longer the defining standard for determining marital legitimacy, its legacy is still highly prevalent in immigration proceedings and continues to present significant challenges to the constitutional doctrine of marital privacy.

Conclusions

Both in annulment and benefits law, it is clear that courts are trying to determine what a “real” marriage is and what it should entail. This is a highly problematic, and virtually impossible, task. From the precedents laid out above, we can see that courts have largely concluded that a “real” marriage involves two people who live together, have sex, and share finances. In reality, there are certainly a myriad of examples of married couples who do not meet some or all of these criteria.

⁹⁵⁷ *Dabaghian v Civiletti*, (1979) 607 F2d 868 (9th Circuit) at 869.

⁹⁵⁸ See generally M Neil, ‘What to Expect at a Stokes Interview’ (*FindLaw*, 27 June 2023)

<<https://www.findlaw.com/immigration/visas/what-to-expect-at-a-stokes-interview.html>> accessed 3 March 2025.

⁹⁵⁹ J Tucker, ‘Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes’ (1989) 7 Yale Law and Policy Review 20 at 95.

⁹⁶⁰ DiDomenico (n 933).

Are they not truly married? While such a couple may meet the “legal marriage” requirement of having a state license, they would not meet the other measures of marital legitimacy.

The hyper-focus of both family law courts and benefit officers on sexual relations as essential to marriage is perhaps the most flawed aspect of the marriage fraud discourse. To require consummation for a showing of a legitimate marriage runs directly contrary to the constitutional right to privacy in sexual relations as discussed in Chapter 2.3. Such focus puts the state in the ludicrous position of asking what sexual contact is “enough” to prove marital legitimacy. Certainly, penetration can no longer be the standard, particularly for same-sex couples. If states intend to look at sex as a factor demonstrating marital legitimacy, it must produce a cogent definition of what “sex” actually is, a task that seems far outside the scope of responsibility of family law judges and benefit officers. This issue is further complicated when we look at non-heteronormative marriages. In particular, asexual and aromantic people may seek companionship in marriage for a wide variety of reasons, but the current doctrine on marital fraud is ill-equipped to allow such persons to avail of marriage as a benefit-granting relationship.

Further, what if sexual contact, whatever that entails, ceases at some point during the marriage? Does the marriage cease to be legitimate at this point? As discussed above, marriages have indeed been voided specifically for the unwillingness or inability of a spouse to engage in sexual intercourse, as engaging in “normal” sex is seen as an ongoing requirement for the marital relation. If an elderly couple decides at some point to sleep in separate bedrooms, should they lose their ability to file taxes jointly? If a man loses his ability to have penetrative sex with his wife due to the onset of a disability, should he lose his marriage-based green card? These examples seem so far-fetched as to be ridiculous, but they in fact follow the reasoning of many marriage fraud cases: that society requires specific behavior from married couples and that to seek to benefit from the institution of marriage without conforming to these behaviors is an act of fraud.

While to date the Supreme Court has allowed for such questioning as a permissible invasion into the privacy of married couples seeking a spousal visa, strong anti-immigration rhetoric from the Trump administration has increased scrutiny on petitioners. As this skepticism grows, how will the marital zone of privacy be affected? Will the concept of “marriage fraud” be expanded to

more readily prevent the issuance of spousal visas? If a marriage is deemed “invalid” for purposes of immigration, what effect will that decision have on the validity of the marriage in other realms? With few definitive standards in place, these remain open questions with the potential to affect the futures of countless immigrants and their US-based spouses.

Given this, it is argued that marriage fraud be recontextualized as an issue of marital consent, and that we focus specifically on fraud that wrongfully secures the consent to marry from the other party. This standard would apply subjectively to the individual context of the spouses, where if a misrepresentation served as the primary inducement for one party to marry, that party can claim fraud when she discovers that misrepresentation. As we have observed through the historical overview above, marriage fraud has traditionally been interpreted as invalidating a marriage when one party was induced to enter the marriage “wrongfully”. Courts traditionally viewed “wrongful” inducement as relating to issues of sexual intimacy and procreation but have begun to expand the doctrine to include other cases of deceit by one party to secure an agreement to marry. This interpretation fits most neatly with the idea of fraud as invalidating marital consent: where the fraud led directly to the issuance of consent, the consent itself cannot be valid as there was no “meeting of the minds” of the spouses contracting to be married. This would be a case of what can be called “unilateral fraud” by one spouse against the other.

By contrast, this principle cannot be applied in the case of what the government might define as “bilateral fraud”, where the spouses decide together to marry to obtain a benefit. In a fictional society, marital benefits could be reserved for couples who are deeply in love, and whose union fits a platonic ideal of a “marital relationship.” However, in reality no such ideal exists and it cannot therefore be the guiding principle for the determination of marital legitimacy. As discussed throughout this thesis, the many governmental attempts throughout US history to codify what a marriage *should* look like result in significant discrimination and the prorogation of a single, monogamous, and highly-Westernized view of marriage that simply is not a genuine reflection of many marriages. We accept that marriages are still “legal” even if they are entered into for purposes other than romantic love. While society may frown on a “gold digger” who marries primarily for financial stability, do we likewise scorn a couple who decides to marry primarily for the purpose of a tax benefit?

The previous chapter discussed how the motivations of a party to agree to marriage, if prompted by extreme external forces, can affect the validity of marital consent. But in cases where no such pressures are present, should the State interrogate the motivations behind a couple's union if they marry under legal processes? Pragmatically, it cannot do so in a reasonably unbiased and neutral fashion, so therefore it should not. Marriage as defined in terms other than legality (meaning the proper issuance of a marriage license) requires a unified vision of the "correct" motivations for marriage, which we as a society simply do not, and arguably should not, have. It is undoubtable that parties decide to enter marriage contracts for a host of reasons other than romantic love. Even if such emotion was a requirement for a legitimate union (which certainly it is not), it would be impossible to be defined or measured. Such an exercise would be a gross governmental overreach and is a fruitless endeavor that can lead to little else than cultural insensitivity and stereotyping.

Therefore, in cases where it is asserted that a party entered a marriage solely for the purpose of obtaining a state benefit, this thesis argues that the benefit should only be denied if the other spouse was deceived as to the marriage's limited purpose. Such a tactic would serve to protect individuals from being fraudulently induced into the contract of marriage but would not trample on the consent abilities of adults who chose of their own volition to enter such agreements. When a couple decides to enter into a marital relationship, their motivations are their own, however much one might wish to impose her own moral or cultural values upon such unions. An understanding of "fraud" as a unilateral concept, imposed on one spouse against the other, is a far more cogent view of the issue that serves to protect individuals from exploitation, while respecting the marital privacy of mutually consenting couples.

3.3. Withdrawal of Consent

The two prior sections have discussed certain instances that family law may accept as invalidating marital consent: duress/coercion and fraud. However, these discussions have focused exclusively on the entry into a marriage, not on circumstances within the marriage itself. As discussed in Chapter 1.2, almost all discourse on “forced marriage” does indeed focus on wrongdoing to secure marital consent at the point of entry into the union. However, this does not take into account many victims in unwanted marriages who were not necessarily forced to *enter* the marriage but were compelled to *remain* in the marriage against their will. This inquiry is therefore expanded to include cases where consent to remain married is withdrawn. In such cases, a spouse wishes to terminate a marriage, but is prevented from doing so by the other spouse, third parties, or the State itself.

To begin this examination of the withdrawal of marital consent, we begin by looking at the “right to exit” as a corollary notion to the “right to association.” We see that the right to exit interpersonal relationships is fundamental to a liberal understanding of personal autonomy and is a foundation for much of the modern understanding of social dynamics. Next, we turn to the application of the right to exit to the “right to divorce”, both theoretically and in the US specifically. Divorce has become a more accepted and commonplace legal tool in the past several decades for couples seeking to exit marriage, particularly through the expansion of “no-fault” divorce. But this “no-fault revolution” has begun to garner significant pushback from certain critics, particularly in the US far-right movement. This assessment therefore ends by looking at the brief literature on the constitutional right to divorce in the US and ultimately conclude that such a right should be enshrined in constitutional doctrine to protect the right to exit for married individuals, particularly those facing external vulnerabilities.

The Right to Exit

We begin the exploration of withdrawal of marital consent by looking at the much-debated “right to exit.” This idea, based in liberal ideology, is rooted in the belief that the ability to freely enter and exit social relationships, be they personal or organizational, is a bedrock element of modern notions of autonomy.⁹⁶¹ As summarized by Libson, “The right to exit is fundamental to the liberal

⁹⁶¹ See A Libson, ‘Not My Fault: Morality and Divorce Law in the Liberal State’ (2019) 93 Tulane Law Review 599.

ideal of being the ‘author of one’s own life,’ entailing an individual’s capacity to make autonomous decisions about her life without constraint, including establishing, revising, and pursuing one’s own ends.”⁹⁶² Spiecker, Ruyter, and Steuel argue that “[t]he right to exit implies that a person has the capacity to make a personal decision and this in turn presupposes at least a level of minimal autonomy or personal independence.”⁹⁶³

The right to exit is integrally connected with the right to association, which is described by Rouméas as “the right to form intimate unions and collectives to pursue shared purposes, be it the love of God or profit” and is widely acknowledged as one of the most fundamental rights of democratic society.⁹⁶⁴ As summarized by Kukathas in the context of cultural communities, “The only fundamental right is that of freedom of association...the primacy of freedom of association is all-important; it has to take priority over other liberties—such as those of speech or worship—which lie at the core of the liberal tradition.”⁹⁶⁵ In the US, the right is enshrined in the 1st Amendment’s Freedom of Association⁹⁶⁶ and has been broadly defined by the US Supreme Court as the right to “enter into and maintain certain intimate human relationships” and which must be “secured against undue intrusion by the State.”⁹⁶⁷ The Court defined the relationship between marriage and the freedom of association in *M.L.B. v. S.L.J.*, stating:

Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society’...rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.

The right to association, and by extension the right to exit, can be applied across a spectrum of social groups, from what Brownlee describes as larger “collective, expressive, and political

⁹⁶² *ibid* at 601.

⁹⁶³ B Spiecker, D De Ruyter and J Steutel, ‘Taking the Right to Exit Seriously’ (2006) 4 *Theory and Research in Education* 313 at 322.

⁹⁶⁴ E Rouméas, ‘The Right to a Fair Exit’ (2023) 22 *Politics, Philosophy & Economics* 160 at 162

⁹⁶⁵ C Kukathas, ‘Are There Any Cultural Rights?’ (1992) 20 *Political Theory* 105 at 248 (In citing Kukathas’ definition on the right of association, this thesis does not necessarily endorse his personal interpretation of the right. Kukathas arguments on the broad allowance of cultural practices as an extension of a liberal right to association, even when such practices lead to the subjugation of women and children, are particularly controversial and worthy of significant criticism. *See eg.* SM Okin, ‘Mistresses of Their Own Destiny’: Group Rights, Gender, and Realistic Rights of Exit’ (2002) 112 *Ethics* 205.)

⁹⁶⁶ US Constitution, Amendment 1.

⁹⁶⁷ *Roberts v United States Jaycees* (1984) 468 US 609 (US Supreme Court).

associations” on one end to “intimate associations”, such as between family members, on the other.⁹⁶⁸ As summarized by Green, “Social groups form the middle-range of political life within which people pursue common goals; these are *purposive associations*. Culture, nation, religion, *family*, profession, avocation—these are the things that make most people's lives valuable.”⁹⁶⁹ For purposes of this thesis, we shall evaluate the right to association and the right to exit within the context of intimate associations, namely marital relationships.⁹⁷⁰ However, regardless of the size of the associative relationship, Brownlee hypothesizes that “associative activities come in two forms. The first are the positive acts of forming and maintaining associations. The second are the negative acts of refusing to form and refusing to maintain associations.”⁹⁷¹ The latter of these, “refusing to maintain”, would presumably encompass the right to exit associations freely.

Under a broad understanding of the right to exit, the State infringes on the right both when it purposefully prevents exit from a relation or when it places excessive barriers or costs on that exit.⁹⁷² Green asserts that in the context of purposive associations, the State is significantly constrained in its ability to force individuals to maintain certain social relationships:

Social groups claim authority to impose restrictions on their members that the state cannot. Churches, ethnic groups, minority nations, universities, social clubs, and families all regulate belief and behavior in ways that would be obviously unjust in the context of a state and its citizens...Such terms of association would be extortionate if applied to a whole political society.⁹⁷³

According to Taylor, high exit costs disproportionately affect vulnerable populations such as domestic abuse victims, exploited workers, and oppressed citizens in their efforts to exercise their right to exit social relationships.⁹⁷⁴ In response, theorists such as Shklar advocate for the securing

⁹⁶⁸ K Brownlee, ‘Freedom of Association: It’s Not What You Think’ (2015) 35 Oxford Journal of Legal Studies 267 at 269.

⁹⁶⁹ L Green, ‘Rights of Exit’ (1998) 4 Legal Theory 165.

⁹⁷⁰ For additional reading on the right to association and exit in the context of larger associate groups, *see eg.* Kukathas (n 965); Okin (n 965); W Galston, ‘Two Concepts of Liberalism’ (1995) 105 Ethics 516; J Raz, ‘Multiculturalism: A Liberal Perspective’, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1995).

⁹⁷¹ Brownlee (n 968) at 270.

⁹⁷² *See generally* Rouméas (n 964) at 163-164.

⁹⁷³ L Green, ‘Rights of Exit’ (1998) 4 Legal Theory 165 at 165.

⁹⁷⁴ RS Taylor, *Exit Left: Markets and Mobility in Republican Thought* (Oxford University Press 2017).

of “conditions that are necessary for the exercise of personal freedom”⁹⁷⁵ and a level of “damage control” over exit costs.⁹⁷⁶ From this perspective, the State has a dual obligation not just to avoid governmental barriers to exiting associative relationships, but also to prevent others from creating excessive costs on exit.⁹⁷⁷

Accepting that the right to exit is at play in a wide variety of interpersonal relationships, we can see its influence in such interactions as sexual intercourse and contractual agreements. An evolved understanding of sexual consent dictates that an individual may, for any reason and at any time, withdraw her consent to engage in intercourse.⁹⁷⁸ She need not show that the actions of her partner were the cause of the withdrawal of consent, but simply that she no longer consents to sexual contact and that contact should therefore cease. To require an individual to physically resist unwanted sexual contact, a requirement that existed in rape law for generations, places a high threshold on her right to exit the relation.⁹⁷⁹ It is quite evident how such a requirement might adversely affect vulnerable persons, as victims of abuse or individuals with reduced mental capacity may not be able to safely or effectively “fight back”, but this does not mean that they should be deemed as automatically consenting to the continuing sexual contact.

In the context of contractual relationships, the right to exit may be in some ways limited but is certainly not eliminated. Importantly, while a party seeking to abandon a contract obligation may suffer economic consequences, she generally cannot be compelled to engage in specific performance that requires any form of service, as this violates the 13th Amendment prohibition of slavery and involuntary servitude.⁹⁸⁰ Let us take for example a worker who has a fixed-term contract with her employer but wishes to abandon the job before the end of the term. While her

⁹⁷⁵ JN Shklar, ‘The Liberalism of Fear’ in NL Rosenblum (ed), *Liberalism and the moral life* (Harvard University Press 1989) at 21.

⁹⁷⁶ *ibid* at 27.

⁹⁷⁷ See generally Taylor (n 974); Shklar (n 975).

⁹⁷⁸ See generally J Pallikkathayil, ‘Consent to Sexual Interactions’ (2019) 19 *Politics, Philosophy & Economics*; A Benoit and S Ronis, ‘A Qualitative Examination of Withdrawing Sexual Consent, Sexual Compliance, and Young Women’s Role as Sexual Gatekeepers’ (2022) 34 *International Journal of Sexual Health* 577; H Fradella and K Brown, ‘Withdrawal of Consent Post-Penetration: Redefining the Law of Rape’ (2005) 14 *Criminal Law Bulletin* 3.

⁹⁷⁹ See generally M Anderson, ‘Reviving Resistance in Rape Law’ [1998] *University of Illinois Law Review* 953; J Decker and P Baroni, ‘No Still Means Yes: The Failure of the Non-Consent Reform Movement in American Rape and Sexual Assault Law’ (2011) 101 *Journal of Criminal Law and Criminology* 1081.

⁹⁸⁰ US Constitution, Amendment 13; see also N Oman, ‘Specific Performance and the Thirteenth Amendment’ (2009) 93 *Minnesota Law Review* 2020. Note that while acknowledging that the contract law generally prohibits specific performance for service contracts, Oman argues that in some instances, specific performance should be an available remedy.

employer may sue the worker for damages incurred in finding an alternative employee, a court cannot order specific performance to compel her to work against her will. Her right to exit is still protected in the contract relationship in a crucial way.

The Right to Divorce

Applying the right to exit to family law, an individual who withdraws her consent to engage in a marital relationship should be given an avenue to exit that marriage.⁹⁸¹ Globally, exit from marriage is primarily accomplished through divorce. For much of Western legal tradition, divorce had been strictly regulated by the State and was only available when a party could show wrongdoing by the other spouse.⁹⁸² However, the 20th century gave rise to the “no-fault revolution”, where many States worldwide began to release their grip on marriage dissolution and allowed couples to seek divorce without the need to prove fault by either party.⁹⁸³ According to Singer, this modern advancement in divorce law reflects a greater level of respect for the decision-making autonomy of individual spouses, stating that “[t]he doctrinal shift from family privacy to decisional autonomy is thus consistent with the rapid shift from fault-based to consensual divorce and ultimately to divorce at the option of either spouse.”⁹⁸⁴ Summarizing the rapid “no-fault revolution”, Rivlin says, “While opposing unilateral divorce may be grounded in family values such as commitment and stability, the plea for unilateral divorce can be comprehended as the demand of those who wish to liberalize the social institution of marriage, turning it into an institution that is built on ongoing choice and satisfaction.”⁹⁸⁵

Rouméas explicitly identifies divorce as an exercise of an individual’s right to exit an association.⁹⁸⁶ She goes on to propose the “right to fair exit”, which she defines “as the right to end an association without excessive and undue cost.”⁹⁸⁷ Arguing against limitations on divorce such as exorbitant legal fees and prolonged court proceedings, she states that “exit should not be merely about excessive costs, but also about undue costs. Broadly speaking, an exit should not

⁹⁸¹ See Libson (n 961).

⁹⁸² See R Rivlin, ‘The Right to Divorce: Its Direction, and Why It Matters’ (2013) 4 International Journal of the Jurisprudence of the Family 133 at 136.

⁹⁸³ See *ibid.*

⁹⁸⁴ J Singer, ‘The Privatization of Family Law’ (1992) 1992 Wisconsin Law Review 1443 at 1512.

⁹⁸⁵ Rivlin (n 982) at 137

⁹⁸⁶ See Rouméas (n 964) at 162 (“The specific contextual freedoms that the right of exit protects are contingent on the nature of the association. Divorce secures marital freedom and protects spouses from domestic abuse.”)

⁹⁸⁷ *ibid.*

only ensure substantive exit opportunities, but also allocate the burdens of exit fairly among the parties.”⁹⁸⁸ To Rouméas, the State not only infringes on the right to exit by intentionally slowing the divorce procedure, but by not providing expedient avenues for parties to equitably settle divorce matters. Rivlin also focuses his arguments for the right to divorce on the State, finding:

The proper understanding of the right to divorce is as a right directed toward the [S]tate, rather than the other spouse, and that there is no necessary relation between the two posited rights. In legal doctrine as well as in moral reasoning, a valid argument in favor of a unilateral no-fault divorce legal regime does nothing to negate the view of breaching one's marital vows as a sin, an immoral action, or even a wrongdoing.⁹⁸⁹

The History of No-Fault Divorce in the US

In line with the “no-fault revolution”, the ability to terminate a marriage under US family law has been vastly expanded over the past 50 years. The early colonies did not permit marriage dissolution under almost any circumstances, following the English tradition of delegating issues of marital breakdown to ecclesiastical bodies.⁹⁹⁰ While states did begin to allow for divorce more readily throughout the 1800s, these cases were still limited to scenarios where one spouse could show wrongdoing on the part of the other, most commonly adultery, desertion, or impotence.⁹⁹¹ The burden of proving such grounds was on the party seeking to terminate the marriage, and the moving party must be able to show “clean hands”; if both parties contributed to the breakdown of the marriage, neither could move for divorce.⁹⁹²

In 1969, California became the first state to introduce a “no-fault” divorce option, which removed the need for a party to prove wrongdoing of the other spouse to seek a divorce. Then-governor Ronald Reagan said of the law, “I believe it is a step towards removing the acrimony and

⁹⁸⁸ *ibid* at 164

⁹⁸⁹ Rivlin (n 982) at 157.

⁹⁹⁰ See J Areen, ‘Uncovering the Reformation Roots of American Marriage and Divorce Law’ (2014) 26 Yale Law Journal 29 at 30-31; Libson (n 961).

⁹⁹¹ See N Blake, *The Road to Reno: A History of Divorce in the United States* (Macmillan and Co 1962), 34-47; see also Libson (n 962) at 604. Other common fault grounds include insanity, conviction of a crime, regular drunkenness, “long absence with presumption of death”, “intolerable cruelty”; Blake (n 991) at 50; J Gregory, P Swisher and R Wilson, *Understanding Family Law* (4th edn, Carolina Academic Pr 2013) at 237.

⁹⁹² See L Bradford, ‘The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws’ (1997) 49 Stanford Law Review 607, 614; A Parkman, ‘Reforming Divorce Reform’ (2001) 41 Santa Clara Law Review 379, 383.

bitterness between a couple that is harmful not only to their children but also to society as a whole...[this law] will do much to remove the sideshow elements in many divorce cases.”⁹⁹³ For the first time, parties could seek dissolution for a breakdown in the marital relationship, rather than a showing of exceptional wrongdoing by either spouse. In the next five years, the “no-fault revolution” swept the nation, with almost all US states adding no-fault as an option for a divorce action or even eliminating all other grounds for divorce.⁹⁹⁴ By 1980, all but two US states had adopted some form of no-fault legislation.⁹⁹⁵

Today, all 50 states have an option for no-fault divorce.⁹⁹⁶ This does not, however, preclude states from placing some limitations on exiting a marriage. For instance, 43 states proscribe trial separation and/or waiting periods before a couple can be divorced. In seven states, couples must wait under 30 days,⁹⁹⁷ in nine states the waiting period is between 30-59 days,⁹⁹⁸ in 13 states the period is between 60-89 days,⁹⁹⁹ in eight states the wait is between 90-119 days,¹⁰⁰⁰ and in five states the waiting period is 120 days or more.¹⁰⁰¹ In addition, three states, Arizona,¹⁰⁰² Louisiana,¹⁰⁰³ and Arkansas,¹⁰⁰⁴ still allow parties to voluntarily enter covenant marriage, where

⁹⁹³ ‘Reagan, Ronald: Gubernatorial Papers, 1966-74: Press Unit’ <<https://www.reaganlibrary.gov/archives/digitized-textual-material>>.

⁹⁹⁴ The states that have eliminated all other grounds but no-fault divorce are Wisconsin, Oregon, Washington, Nevada, Nebraska, Montana, Missouri, Minnesota, Michigan, Kentucky, Kansas, Iowa, Indiana, Hawaii, Florida, Colorado, and California.

⁹⁹⁵ See eg. L Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (Free Pr 1985) at 15-16; Libson (n 961) at 605.

⁹⁹⁶ This trend was reflected in a great number of Western legal systems in the late 20th century, with the notable exclusion of Ireland, which only adopted no-fault divorce in 1996.

⁹⁹⁷ Florida (FL Stat § 61.19); Hawaii (Haw. Rev. Stat. §580-1); Idaho (I.C.A.S § 32-701); Montana (Mont. Code § 40-4-108); Oklahoma (Okla. Stat. Title 43 § 123); West Virginia (WV Code § 48-5-202); Wyoming (WY Stat. § 20-2-101 et seq.).

⁹⁹⁸ Alabama (AL Code § 30-2-8.1); Alaska (AK Stat § 25.24.200); Arkansas (AR Code § 9-12-301); Georgia (GA Code § 19-5-3); Missouri (MO Rev. Stat. § 452.305); New Mexico (NM Stat. § 40); North Carolina (NC Gen. Stat. § 50-6); Ohio (Ohio Rev. Code Chapter § 3105); Utah (Utah Code § 81-4-402).

⁹⁹⁹ Arizona (A.R.S § 25-329); Indiana (Ind. Code § 31-15-2-2); Kansas (Kan. Stat. § 23-2708); Kentucky (K.R.S § 403.170); Maine (M.R.S. Title 19-A, Chapter 29); Michigan (M.C.L § 552.9f); Mississippi (Miss. Code § 93-5-2); Nebraska (Neb. Rev. Stat. § 42-363); RI Gen. Laws § 15-5-1; South Dakota (SD Cod. L. § 25-4-34); Tennessee (Tenn. Code § 36-4-101); Texas (Tex. Fam. Code § 6.702), Vermont (V.S. Title 15 § 554).

¹⁰⁰⁰ California (Cal. Fam. Code § 2339(a); Colorado (C.R.S. § 14-10-106 (1)(a)(III)); Connecticut (Public Act No. 23-46); Illinois (ILCS § 5/401); Iowa (Iowa Code § 598.19); Massachusetts (M.G.L, Part II, Title III, Chapter 208); Pennsylvania (Penn. Con. Stat Title 23 §3301(c)).

¹⁰⁰¹ Delaware (D. Code Title 13 § 1507); Louisiana (LA Civ. Code Art. 103.1); Maryland ((M.F.L.C § 7-103); Virginia (VA Code § 20-91); Wisconsin (Wis. Stat. § 767.335).

¹⁰⁰² ARS§ 25-901.

¹⁰⁰³ L.R.S. § 9:307.

¹⁰⁰⁴ AR Code § 9-11-803.

the parties cannot seek a divorce except under certain conditions such as adultery or sexual abuse.¹⁰⁰⁵

Nevertheless, the expedience of the legislative adoption of no-fault divorce demonstrates a wider cultural shift occurring in the latter half of the 20th century, where spouses were increasingly seen as two individuals that must consent to be married, rather than a singular legal unit headed by a male patriarch. Many women's rights advocacy groups nationwide have heralded the shift to no-fault divorce as lifesaving, as legal barriers to exiting a marriage are often cited by domestic violence victims as impediments to escaping abusive partners.¹⁰⁰⁶ The advent of no-fault divorce seems to have achieved many of the aims of feminist groups, with significant improvements in national intimate partner violence statistics since its inception. For example, Stevenson and Wolfers provide evidence that domestic violence and intimate partner murder dropped by 30% and 10% respectively between 1976 and 1985 and that since the uniform adoption of no-fault divorce, married women's suicide rates have dropped by 20%.¹⁰⁰⁷

Pushback Against No-Fault Divorce in the US

However, not all scholars have endorsed no-fault divorce as a universal practice. Some have cited the allowance of no-fault divorce as a significant factor in rising divorce rates in the past several decades.¹⁰⁰⁸ These critics view a higher divorce rate as a social ill, arguing that it has a documented negative effect on children and denigrates the idea that the family is a collective unit with its own societal value.¹⁰⁰⁹ Some challenge no-fault divorce in the context of proper judicial procedure, such as Willet who contends that a broad allowance of no-fault divorce violates the due process rights of a spouse seeking to remain married, as a spouse cannot resist the dissolution

¹⁰⁰⁵ The limited availability of covenant marriage in the US is discussed in Chapter 1.3.

¹⁰⁰⁶ See R Feinglos and S Laurenzi, 'America Makes It Too Hard and Dangerous to Get Divorced' *TIME* (27 April 2023).

¹⁰⁰⁷ B Stevenson and J Wolfers, 'Bargaining in the Shadow of the Law: Divorce Laws and Family Distress' [2006] *Quarterly Journal of Economics* 267.

¹⁰⁰⁸ See B Whitehead, *The Divorce Culture* (Alfred a Knopf Inc 1997); T Marvell, 'Divorce Rates and the Fault Requirement' (1989) 23 *Law and Society Review* 543; L Friedberg, 'Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data' (1998) 88 *American Economic Review* 608; P Nakonezny, 'The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity' (1995) 57 *Marriage and Family* 477.

¹⁰⁰⁹ See B Hafen, 'The Family as an Entity' (1989) 22 *U.C. Davis L. Rev.* 865; S FitzGibbon, 'A City Without Duty, Fault, or Shame' in R Wilson (ed), *Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution* (Cambridge University Press 2006).

of the marriage if the other party pursues no-fault grounds.¹⁰¹⁰ This sentiment was echoed by former Chief Justice of the Supreme Court of Georgia, Leah Ward Sears, who stated, “It concerns me greatly that with respect to one of the most important contractual obligations in society, no-fault permits one party to break his or her contractual obligation without due process.”¹⁰¹¹

Some researchers claim that the broad allowance of no-fault divorce has actually disadvantaged women, who they argue often suffer economic hardship in the wake of marital breakdown.¹⁰¹² Herring for example argues that, “Putting central value on the autonomy of the parties to leave the relationship and pursue their own life goal will disadvantage the party who has invested more in it and has suffered economic or social disadvantage as a result. In most relationships, especially where there are children, that will be women.”¹⁰¹³ Weitzman’s 1985 study did indeed indicate that women suffer significant economic hardship after divorce, demonstrating women experience a 73% decrease in their standard of living post-divorce, while men see a 42% increase in their standard.¹⁰¹⁴ These statistics have been heavily challenged, particularly in the modern era where many women have secured a more equal economic position to their spouses.¹⁰¹⁵ Still, critics such as Libson contend that no-fault divorce has taken away the option for women to use consent to divorce as a “bargaining chip” to secure a better economic situation post-marriage.¹⁰¹⁶

Even with these critiques, few legal scholars have argued for the complete elimination of no-fault divorce, but rather a system where both no-fault and fault-based divorces can coexist at the state court level.¹⁰¹⁷ By contrast, the rise of prominent far-right political figures in the past several years has given vigor to an argument for the total abolition of no-fault divorce. Conservative

¹⁰¹⁰ B Willet, ‘There Is No Republican Plot to End No-Fault Divorce — but There Should Be’ *Washington Examiner* (18 August 2023).

¹⁰¹¹ *ibid.*

¹⁰¹² *See* Weitzman (n 995); Libson (n 961).

¹⁰¹³ Herring (n 378).

¹⁰¹⁴ Weitzman (n 995).

¹⁰¹⁵ F Lee, ‘Influential Study on Divorce’s Impact Is Said to Be Flawed’ *New York Times* (9 May 1996); C Rapp, ‘Lies, Damned Lies, and Lenore Weitzman’ <www.acbr.com/biglie.htm> accessed 6 March 2025.

¹⁰¹⁶ *See* Libson (n 961).

¹⁰¹⁷ Indeed, 15 states still allow for a voluntary filing under fault grounds, including Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Georgia, Maryland, New Jersey, New York, North Carolina, South Carolina, Vermont, and Virginia.

pundits such as Steve Crowder¹⁰¹⁸ and Matt Walsh,¹⁰¹⁹ who both boast millions of social media followers, have been particularly outspoken with their criticism of no-fault divorce. Several contributors to the ultra-conservative political agenda “Project 2025” have identified the elimination of no-fault divorce as a policy priority for the Trump presidency.¹⁰²⁰ This is particularly alarming as one of the country’s most prominent opposers of no-fault divorce is Trump’s Vice President, JD Vance. In a controversial 2022 interview, Vance seemed to suggest that even couples in violent relationships should remain married:

One of the great tricks that I think the sexual revolution pulled on the American populace...[is that] these marriages were, fundamentally, you know, they were maybe even violent, but certainly they were unhappy, and so getting rid of them and making it easier for people to shift spouses like they change underwear, that’s going to make people happier in the long term.¹⁰²¹

This growing criticism of no-fault divorce has been recently channeled into legislative action. Conservative lawmakers in Louisiana,¹⁰²² Oklahoma,¹⁰²³ Nebraska,¹⁰²⁴ and Texas¹⁰²⁵ have all proposed legislation to eliminate no-fault divorce since 2016. US Speaker of the House Mike Johnson has claimed that the advent of no-fault divorce has turned the US into a “completely amoral society.”¹⁰²⁶ The Republican Party of Texas issued a 2022 statement calling on the “the Legislature to rescind unilateral no-fault divorce laws, to support covenant marriage, and to pass legislation extending the period of time in which a divorce may occur to six months after the date

¹⁰¹⁸ Crowder S, Youtube Video, June 2022 (“No-fault divorce...means that in many of these states, if a woman cheats on you, she leaves, she takes half. So it’s not no-fault, it’s the fault of the man...there need to be changes to marital laws...”)

¹⁰¹⁹ Walsh, M, Twitter, 10 January 2023 (“I’ve been publicly opposed to no fault divorce for as long as I’ve had a platform.”)

¹⁰²⁰ See A Lefkowitz, ‘The Right Aims to Turn Back the Clock on American Divorce Law’ *TIME* (23 July 2024).

¹⁰²¹ Interview with JD Vance, ‘Speech at Pacifica Christian High School’ (September 2022); see also Cameron Joseph, ‘JD Vance Suggests People in “Violent” Marriages Shouldn’t Get Divorced’ *Vice News* (25 July 2022).

¹⁰²² See J O’Donoghue, ‘Louisiana Republican Party Considers Backing Elimination of No-Fault Divorce’ *New Orleans Public Radio* (12 January 2023).

¹⁰²³ B Hoberock, ‘New Oklahoma Senator Files Bill That Would End No-Fault Divorces in the State’ *Oklahoma Voice* (26 January 2024).

¹⁰²⁴ ‘Family’ (Nebraska GOP) <<https://ne.gop/family/>> accessed 3 March 2025.

¹⁰²⁵ ‘2024 Platforms and Resolutions’ (Republican Party of Texas) <<https://texasgop.org/official-documents/#platform>>.

¹⁰²⁶ M Johnson, ‘Preserving Liberty’ (Christian Center Shreveport, 2016).

of filing for divorce.”¹⁰²⁷ No-fault critics and legislators are particularly concerned with divorces initiated by women, which account for 70% of all US divorces.¹⁰²⁸

While critics of no-fault paint divorce in the US as a runaway train, the data shows a different reality. While the advent of no-fault divorce did indeed correlate with an initial spike in divorce rates, this rate has significantly decreased since that time.¹⁰²⁹ In fact, census data indicates US divorce rates hit at 50 year-low in 2019 and have continued to fall.¹⁰³⁰ As we can see from the above-quoted statements, conservative vitriol against no-fault divorce is in many ways based in a perception of declining moral values than the reality of family law statistics. Regardless of reasoning, since its inception in the mid-20th century, no-fault divorce has never faced the level of political pushback as it does today. We now therefore turn to the question of the constitutionality of the recent efforts to constrain no-fault divorce.

The Right to Divorce and US Constitutional Law

The right to marry/ marriage has been discussed at length in Chapter 2.3. Although the origins and parameters of the right are arguably murky, what is clear is that marriage is a protected substantive due process right at the federal level. However, the issue of a corresponding constitutional right to divorce has not been definitively espoused by the US Supreme Court. The Harvard Law Review has stated:

While there appears to be no basis in Anglo-American tradition for a...fundamental right to divorce as such, it should be envisioned as a necessary complement to the right to marry. A liberal right to divorce may be a pre-requisite to full exercise of the right to marry; to the extent that divorce is unavailable, the right to remarry is burdened.¹⁰³¹

The Court recognized the autonomy of individuals in an existing marriage in *Eisenstadt v. Baird*, where it stated that “the marital couple is not an independent entity with a mind and heart of its

¹⁰²⁷ ‘Platform and Resolutions as Amended and Adopted by the 2022 State Convention’ (Republican Party of Texas) <<https://texasgop.org/wp-content/uploads/2024/06/2022-RPT-Platform.pdf>>.

¹⁰²⁸ See eg. Feinglos and Laurenzi (n 1006).

¹⁰²⁹ J Loo, ‘Divorce: More than a Century of Change, 1900-2022’ (National Center for Family and Marriage Research 2024) Family Profile No. 11, 2024.

¹⁰³⁰ See eg. C Buck, P Hemez and L Anderson, ‘U.S. Divorce Rates Down, Marriage Rates Stagnant From 2012-2022’ (United States Census Bureau 2024).

¹⁰³¹ ‘Developments in the Law: The Constitution and the Family’ (1980) 93 Harvard Law Review 1156.

own, but an association of two individuals each with a separate intellectual and emotional makeup.” Yet, the closest that the Court has come to determining a right to exit marriage was in *Boddie v. CT*, where the Court concluded that indigent petitioners have a due process right to seek divorce free of charge.¹⁰³² As Justice Douglas states, the case “puts ‘flesh’ upon the Due Process Clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge.”¹⁰³³ The Court’s reasoning in that case was that the ability to divorce was integrally related to an individual’s right to remarry.¹⁰³⁴ The right to marry was therefore undermined by limitations on the ability to divorce. Bosworth argues that the ruling in *Boddie* creates a substantive due process right to divorce.¹⁰³⁵ However, the Court did not state that there is a defined “right to divorce” and has since clarified the confines of the relationship of the right to marry and restraints on divorce. For example, in *Sonsa v. Iowa*, the Court concluded that durational residency requirements to seek a divorce in the state did not infringe on the right to marry, as such a limitation would merely delay, not eliminate a party’s ability to divorce and thus seek a remarriage.¹⁰³⁶

Whether there is a constitutional right to divorce, and what that right entails, may depend significantly on the distinction between the “right to marry” and the “right to marriage” as discussed in Chapter 2.3. If the Constitution protects a “right to marry”, that is, the ability to freely enter into a marital relationship, then the corresponding right to divorce would be limited to cases where the state imposes a restriction that could impede a party from *remarrying* (as was the Court’s reasoning in *Bodie*.) However, if the right should more aptly be described as the “right to marriage”, creating a zone of privacy around the ongoing marital relationship, then the right to divorce would likewise be a much broader concept. Thought of as a privacy issue, the right to divorce would protect the ability of individuals to make decisions about the maintenance of their marriage and their mutual desire to remain in the union. Under this conceptualization, the State would be extremally limited in its ability to restrict pathways to exit, specifically divorce. As discussed in Chapter 2.3, if couched under the privacy right of right to marriage, the right to divorce would receive strict scrutiny analysis, making it very difficult for states to regulate the practice. It is hard to imagine that recent efforts to eliminate no-fault divorce would pass such

¹⁰³² *Boddie v. Connecticut* (n 307).

¹⁰³³ *ibid.*

¹⁰³⁴ *ibid.*

¹⁰³⁵ See T Bosworth, ‘The Federal Constitutional Right to Divorce’ (2004) 14 Contemporary Legal Issues 103.

¹⁰³⁶ *Sosna v Iowa* (1975) 419 US 393 (US Supreme Court).

scrutiny, and even existing provisions on separation periods and waiting times for divorce could be seen as undue restrictions.

Conclusions

Current state laws have firmly enshrined no-fault divorce as a fixture of US family law. As we have seen from prior chapters, it is a rare thing for states to have such consistent statutes in relation to marriage, so where there is relative uniformity, there will likely be stark opposition to any radical variation. While calls for the limitation or elimination of no-fault divorce may be growing, it seems unlikely that no-fault laws will be widely altered, at least in the near future.

However, any limitations on divorce, existing or proposed, still pose a significant threat to the “right to exit.” The fault-based divorce system completely overrides the right to exit, as such restrictions necessarily preclude a party from withdrawing from a marriage solely based on her own autonomy. Instead, a party can only seek to exit a marriage when the other party has committed a “wrong” that has been proscribed by the court as sufficient to terminate the union. Covenant marriages, although permitted in only a small minority of states, do indeed curtail this right to exit almost entirely.

Even limitations on divorce, such as separation and waiting periods, can significantly burden the right to exit a marriage. There is an inherent, and arguably unwarranted, paternalism when states impose such restrictions. Once an individual withdraws her consent to remain in an interpersonal relationship, or even a contractual relationship, how can the State compel her to remain in such relationship without infringing on her right to exit? While many critics remain skeptical of divorce for its effects on children and other social institutions, the State cannot rely on such justifications to compel marital unions to continue once consent to remain has been withdrawn. Couples can choose to remain married for the good of their children, or indeed as a statement about the importance of marriage as an institution to them personally, but this choice is one that belongs to the individual spouses. To compel parties to remain in unhappy marriages is not only a significant infringement on their right to exit, but poor public policy. Such limitations give a powerful tool to potentially abusive spouses, as well as third parties, who seek to compel an individual to remain in a marriage that she independently wishes to exit. While a trial separation

or waiting period to pursue a divorce may not seem a high barrier to the right to exit, it can for the victim of severe duress or coercion to remain in a marriage be an insurmountable obstacle.

A definitive finding of a substantive due process right to divorce at the Supreme Court level would go a long way in curbing state efforts to restrict parties from terminating their marital relationships. The existing jurisprudence on the right to marry/marriage does give the Court substantial footing for such a finding, as the right to divorce is a natural corollary right. Whether through advancements at the judicial level or through legislative reform, a pillar of marital consent must be the free ability to withdraw that consent, and to have that withdrawal honored and protected by the State.

FINAL CONCLUSIONS AND RECOMMENDATIONS

The Need for Concrete Definitions

From the onset of this research, it became clear that US law, and the international community at large, has failed to concretely and logically define the concept of “forced marriage.” As discussed throughout this thesis, “forced marriage” has become an umbrella term to encapsulate all forms of non-consensual marriage, becoming an amorphous and unwieldy descriptor without clear boundaries. Without even basic agreement on terminology, it is little wonder that efforts to address “forced marriage”, both in the US and beyond, have had such questionable effectiveness. Simply put: how can we fix what we cannot even define?

While, as demonstrated in Chapter 1.2, most definitions of forced marriage require a showing of the lack of “full and free consent”, little attention has been paid to what actually makes consent legitimate. Accordingly, a major goal of this thesis was to determine what constitutes legitimate marital consent under US law, as well as what factors invalidate this consent. This research continuously returned to this guiding question: what level of “yes” is enough to make a marriage legitimate? While there is no easy answer, this thesis has provided suggestions for how we should assess a party’s “yes” to marriage, both at the time of entry and throughout the union. Perhaps controversially, it therefore argued that “forced marriage” should be eliminated from the preeminent lexicon. The term is simultaneously overbroad and underinclusive. It is overbroad when applied to cases where consent is not in fact obtained through force but is nevertheless

invalid due to a party's age or mental capacity, as discussed in Chapters 2.1 and 2.2. It is also underinclusive in that the term "force" implies a level of direct violence that does not encapsulate the diverse duress, coercion and fraud factors that may be present in the procurement of marital consent, as discussed in Chapters 3.1 and 3.2.

Therefore, following terminology is recommended (some of which has been discussed in other areas of this thesis):

Marital consent: Consent to enter to into and/or remain in a marriage.

Non-consensual marriage: All marriages where there is invalid consent to enter and/or remain married, including limited capacity marriage, duress-based marriage, coercion-based marriage, and fraud-based marriage.

Limited Capacity Marriage: Marriage where one or both parties lack the requisite capacity to enter into or remain in the union. This includes all marriages of minors under the age of legal majority.

Duress-based Marriage: Marriage where a party consents to enter or to remain in the union under threat of injury, when she otherwise would not have consented. The threatened injury can be physical, emotional, mental, social, financial, or any other form of injury that would result in severe distress to the consenting party. The threat can be made by the other spouse or by a third party.

Coercion-based Marriage: Marriage where a party consents to enter or to remain in the union based on a compelling offer, when she would not have consented without extreme external pressuring factors and the offering party is aware of these factors. External pressuring factors can be based in economics, social conditions, or other hardships which severely impact the health, safety, and/or security of the consenting party. The offer can be made by the other spouse or by a third party.

Fraud-based Marriage: Marriage where a party consents to enter or to remain in the union based on a fraudulent misrepresentation by the other spouse or by a third party, and when she would not have consented without that misrepresentation.

The above terminology creates, for the first time, clear and concrete categorizations in the area of consent and marriage. However, it is also necessary at this stage to raise a potential challenge to the reliance on such definitions in practical, real-world settings. Namely, how adherence to definitions may limit the ability of judges to make discretionary rulings in family law cases. Family law decisions are highly context-specific; each marriage is completely unique and will have a myriad of factors distinct to the parties and their individual circumstances. Without the ability to apply significant discretion in their rulings, family law judges may be “hemmed in” by legislative language that is not contextually appropriate for the case at hand. The consequences to such a limitation could be, in theory, quite severe if a judge is limited by existing definitions in her ability to make a ruling that is tailored to the specific family before her.

Nevertheless, this thesis has demonstrated that the current lack of uniform definitions and clear legislative language has already led to often concerning applications of judicial discretion. For example, as outlined in Chapter 2.1, judges from 2000-2020 approved 31,389 cases where the marriage of the parties would qualify as statutory rape if it were not for the state’s marital rape exception, and in 8227 cases judges approved marriages where no such exception exists, so every act of sex between the parties is rape under the criminal law. It is difficult to rationalize these decisions without an understanding of why and how judges reached these judgements, and without any clear definitional framework in state family law, this analysis is impossible. Because the current understanding of forced marriage under state laws has created such a strict binary between “good” and “bad” marriages, judges are left to apply their own personal mores on decisions of marital consent, which has in many cases, such as those referenced above, led to incongruent, and potentially dangerous, rulings.

To use clearer definitions within family law in fact does not necessarily remove discretion from judges, but in fact gives them a more concrete, but in some ways much broader framework in which to make their rulings. Indeed, the proposed definitions vastly expand on the types of marriages that can be viewed as non-consensual, opening up judicial evaluation to cases that would not have otherwise fit under the narrow forced marriage framework. Furthermore, the use of consistent definitions throughout state laws provides litigants with more consistency across jurisdictions, where a judge’s ruling in one state must comport with a nationwide understanding

of valid marital consent. In this way, individuals in one state will not face less judicial protection than those in other states.

It is therefore hoped that these definitions can provide a baseline by which researchers may explore non-consensual marriage and envision legislative and social-support solutions for lawmakers and judges alike. This thesis draws upon these definitions in the following conclusions.

Revising Legislation on Marriages of Persons with Limited Capacity

From the exploration of factors limiting the capacity to consent to marry, namely infancy and mental disability, central issue is identified: a disregard for both the protection and personal autonomy of parties with limited capacity. While there is significant variation amongst state laws, there is a general consensus that infancy and mental incapacity will render the marriage contract, at the least, voidable. However, almost all states will allow another person of seemingly greater capacity, namely a parent, guardian, or judge, to substitute in their consent for the party with reduced capacity. This concept of what can be called “vicarious consent to marry” is illogical under any theory of consent, be it permissive or originating.

As discussed in Chapter 1.4, under permissive consent theory, an impermissible act becomes permissible through the giving of consent and this theory underlies the modern understanding of sexual consent. Under permissive theory, if consent is not given, or if the individual is incapable of giving valid consent, the act is morally, and in some cases legally, impermissible.¹⁰³⁷ Yet, in the case of marriage, we allow a third party to provide the requisite consent for the union, and everything that relationship entails, including sexual relations between the parties. Indeed, as we saw in Chapters 2.1 and 2.2, many states specifically exempt married couples for the state’s ordinary sexual assault laws related to victims of reduced capacity. In this way, a parent, guardian, or judge steps in as the consent-giver for the party of limited capacity, which is a highly concerning allowance in the case of marital relationships.

Can consent of a third party truly equate to even the permissive consent necessary for the marriage relationship and sexual acts within the marriage? Almost undoubtably now: this

¹⁰³⁷ See eg. Schaber (n 368).

vicarious consent-giving runs contrary to the concept of personal and bodily autonomy. We would not ordinarily allow parents to sign a waiver for their child to engage in sex under the age of consent; we would not have a judge wipe away allegations of sexual assault against a person with a mental disability simply because the judge believes the sex act was in the “best interest” of the parties. Yet, in the case of marriage, both of these scenarios are suddenly allowable.

Vicarious consent for marriage is an even more dubious concept when viewed through the lens of originating consent theory. Originating consent envisions that the mutual consent of two individuals creates the relationship, which is ongoing and continually evolving.¹⁰³⁸ As discussed in Chapter 1.4, originating consent is the more appropriate model under which we should evaluate marriage, and vicarious consent by third parties simply does not comport with this model. When a parent, guardian, or judge “signs off” on a marriage for a party of limited capacity, their involvement is fleeting, yet it is the party themselves that remains in the marriage, sometimes for life. The law proscribes that the party of limited capacity cannot of their own volition consent to the marriage, yet they are now somehow deemed to be capable of giving ongoing consent to the marital relationship.

If vicarious consent to marriage is not protective enough over parties of limited capacity, conversely that the current laws on marital consent are also overly paternalistic in their broadness. Specifically in the case of restrictions on persons with mental disabilities, as discussed in Chapter 2.2, the decision to grant a marriage license is often left in the sole discretion of a clerk. In some states, any individual who is deemed mentally incapable by the clerk can summarily be denied a marriage license. Such laws are presumably written with the intent to prevent marriages where an individual has a mental disability that would make them incapable of giving valid consent. However, the clerk is neither a judge nor mental health professional: it is wholly illogical, and indeed likely a breach of due process, to put the power of granting or denying a marriage license to a person with a mental disability solely in the hands of the clerk. While, presumably, if an individual believes they have been wrongfully denied the license, they could appeal such a decision to a judge to make the final determination of the individual’s capacity to marry. However, this process is not clear in the current state law and court clerks are seemingly largely unfettered in their discretion.

¹⁰³⁸ *See eg.* O’Shea (n 374).

While it may seem counterintuitive to argue that marital consent law can be both under-protective and overly paternalistic, both of these criticisms lead to the same conclusion: marital consent capacity laws, as they stand, dismiss almost entirely the personal autonomy of children and persons with mental disabilities. By putting the final decision on the ability of a party to marry in the hands of a parent, guardian, and/or judge, we override the autonomy of the individual who is actually to be married. The law deems that these parties of greater capacity “know what is best” for their children and wards, when in fact the law has already stated that it is in fact *not* in the best interest of children or persons with certain mental disabilities to marry through the very existence of such limitations on their consent capacity.

In response to this central contradiction, the law has concocted a strange solution: the fictional *creation* of capacity for married individuals. This “capacity creation” comes in several forms. For children, auto-emancipation statutes deem that children have legal capacity that their peers do not, even when there has been no showing of the child’s independence, financial or otherwise, other than the marriage itself.¹⁰³⁹ For persons with mental disabilities, capacity creation comes in the form of the cutting off of benefits when a party marries, under the unsupported supposition that a married party is more independent, or at least more financially stable, than an unmarried one.¹⁰⁴⁰ Rape exceptions for married parties again illustrate lawmakers’ belief that marriage spontaneously creates capacity: a person does not have the mental capacity to consent to any sexual contact the day before her marriage, yet the day after, she spontaneously has full consent capacity for sex with her spouse.¹⁰⁴¹

On first glance, we might think that such provisions are designed to enhance the independence of parties of limited capacity, in line with regular court-ordered emancipation or the removal of guardianship. However, in those examples, the court has considered a wide range of facts about the actual circumstances of the individual: the judge looks to the individual and their level of self-sufficiency and ability to care for themselves without State support.¹⁰⁴² By contrast, automatic capacity-creation procedures through marriage do not serve to honor the autonomy of children

¹⁰³⁹ See Chapter 2.1.

¹⁰⁴⁰ See Chapter 2.2.

¹⁰⁴¹ See Statute Compendium D.

¹⁰⁴² See Statute Compendium C.

and persons with mental disabilities, but in fact disregard the individual by ignoring their personal circumstances and vulnerabilities by blanketing all married parties under the label “capable.” Bestowing legal capacity on parties of limited capacity simply because they are married does not empower them: it simply allows the State to wash its hands of their care. Therefore, state laws on marital capacity fail on two fronts: they neither adequately protect parties of limited capacity, nor do they sufficiently honor their personal autonomy. In response, capacity law should be made clear, brightline, and uniform.

For children, this requires a uniform marriage age of 18 in all states with no exceptions. As we have seen, the law in almost all other areas accepts that there are certain activities that a minor cannot engage in until they have reached the age of state-determined capacity. Marriage is a strange, and seemingly antiquated, exception to the progression of children’s protection under US law. The continuing existence of marriage-age exceptions is largely driven by legislators’ concerns for children in special circumstances who somehow “need” to marry, primarily children who become pregnant.¹⁰⁴³ Yet, as we have seen in the limited available research, pregnant children who remain unmarried have better long-term outcomes than pregnant children who marry.¹⁰⁴⁴ Furthermore, these same law makers who argue so vehemently for the need for children to marry upon pregnancy do nothing to address the other capacity-restrictions on such children. Would these legislators argue that a 12-year-old girl who has a child be granted an early driver’s license to bring the child to daycare? Should a 16-year-old father be allowed to drink alcohol because he is now “an adult”? Such questioning highlights the strange logic of legislative arguments on the “necessity” of marriage for pregnant children in light of other state laws on child protection.

To create a brightline standard against child marriage does not deny children the ability to marry, just as requiring a child to be 16 before obtaining a license or 21 before purchasing alcohol does not deny her the ability to drive or to drink: it simply delays this activity until the age of legal capacity. Such a standard will create uniformity and consistency both within state laws and amongst US states, as well as invalidating the illogical, and arguably dangerous, child auto-

¹⁰⁴³ See Chapter 2.1

¹⁰⁴⁴ See *eg.* Dahl (n 235); Talbott (n 235); Wahi and others (n 120).

emancipation and marital rape exceptions that exist in many states, against which this thesis has fervently argued.

For persons with mental disability, state laws should be significantly different than those relating to child marriage, but no less clear in wording. Currently, marital capacity laws treat children and persons with mental disabilities substantively the same: providing certain limitations on the issuance of a marriage license, but broad allowance for annulment in such cases. This conceptualization is inadequate in the case of persons with mental disability. Firstly, it fails to distinguish what form and severity of mental disability makes an individual incapable of consenting to marriage. As discussed in Chapter 2.2, mental disability is an exceptionally broad categorization that cannot be as easily defined as “children under 18”. Second, current marriage laws are both overly restrictive for individuals that may be arbitrarily deemed “mentally incompetent” and simultaneously under-protective for individuals who may lack capacity to consent but go unidentified by a clerk. An annulment in the latter case may help invalidate the marriage, but it will not rectify the substantial harm that such an individual may have already experienced. For instance, by the time the annulment is procured for such an individual, sexual intercourse is likely to already have occurred, and in some states would be un-prosecutable, as the sex was allowable under the state’s marital rape exceptions. Finally, unlike in child marriage, where an age restriction can *delay* the ability of an individual to marry, restrictions due to mental disability can completely *deny* marriage to certain individuals, and therefore such capacity restrictions must be treated with a high level of specificity and scrutiny.

In response, the following standards are proposed: if a clerk of court has any concern about the mental capacity of a party applying for a marriage license, she should not summarily deny the application. Instead, the clerk should refer the matter to the appropriate guardianship court of the jurisdiction. That court should look at the evidence of the individual’s capacity as it would in a petition for guardianship/conservatorship. If the judge is satisfied that the party has adequate mental capacity to understand and appreciate the ramifications of marriage, she will decree that the party has capacity to marry. Note that this differs significantly from judicial approval in cases of child marriage or where an individual is already under guardianship. In those instances, the party is already deemed to be of limited capacity, either due to their age or by virtue of an existing guardianship order. For a judge to give permission for a marriage in such instances is a

form of substituted judgement (or vicarious consent) for the individual of limited capacity, which as stated above, are incompatible with a valid understanding of consent. By contrast, this capacity-assessment would mean that a judge determines that an individual does or does not have capacity for purposes of giving independent marital consent. Only a decision that a person has such capacity will allow the marriage license to be issued. In this way, the judge does not decide “what is best” for the parties but decides only if the parties can make a balanced judgement on what is best for themselves.

These recommendations will not cure all ills in the area of capacity and marital consent. For instance, even the brightline laws recommended above will not prevent children from being brought overseas for marriage or from being married in religious ceremonies not recognized by the State. Individuals with mental disabilities may feel that they face undue scrutiny in their decision-making if subjected to the capacity assessments. Indeed, any restrictions on marriage for children or persons with mental disabilities might be subject to constitutional challenge, as discussed in Chapter 2.3. In addition, a change of the laws going forward does not address the marriages of those children and persons with mental disabilities who are already married. While this thesis concludes that many of these marriages may lack appropriate marital consent, it does not necessarily follow that automatic annulment of such unions is the appropriate solution. Such invalidation could lead to massive instability for such parties and have a myriad of unintended consequences that do more harm than good. So, while there may not be a “silver bullet” to address capacity and marital consent, it is maintained that these proposed legislative revisions would go a long way in creating consistency and clarity in US family law and create a system aimed at the simultaneous protection of parties with limited capacity and respect for the autonomy of these individuals.

A Broader Understanding of Marital Consent

A lack of definitional specificity around conditions that invalidate marital consent has led to little cohesion in the US’s national concept of what makes an impermissible marriage. Such a void in understanding has allowed for the weaponization of “forced marriage claims” against marginalized communities. When the public conceptualization of an issue remains amorphic, it is easy to imagine it only happens “to others”, without identifying the practice in our own communities. For instance, a marriage that might be considered a form of “honor violence” if it

occurred in a Muslim family might easily be shrugged off as a “shotgun wedding” in a white family; an American couple may choose to marry for mutual tax benefits with little scrutiny, but an immigrant couple who marries for the purposes of obtaining a spousal visa has committed the “marriage fraud”; what we may laugh off as an “unhappy housewife” in one family might be pitied as little more than indentured servant in another, trapped in a marriage she cannot escape. The language we use to describe these marriages creates radically different responses from lawmakers and the general public. Without clear understanding of the breadth of factors that can affect marital consent, it is unsurprising that discourse has focused myopically on practices within minority communities rather than expanding this inquiry to all married couples. The hyperfocus on “culture” as a driver of non-consensual marriages serves both to stigmatize minority communities and to ignore the plight of individuals who may face such marriages in forms that are seemingly acceptable to the public at large.

For this reason, future discourse on non-consensual marriage should rely significantly less on preconceived notions of *who* induces non-consensual marriage, and considerably more on *how* such marriages are induced. With this perspective, we can see how different forms of duress, coercion, and fraud may be used by any spouse, family, community, or even a State actor in securing consent to enter a marriage or keeping individuals in unwanted marriages. Certainly, cultural understanding will still be necessary in evaluating such cases: in order to assess influence of external factors on an individual’s giving of consent, we must endeavor to fully understand the context of those factors. Nevertheless, moving the understanding of non-consensual marriage from a “cultural issue” to a broader societal issue will require an expansion in thinking. That expansion may be uncomfortable: it may require a reassessment of deeply rooted beliefs about marriages, families, and social relationships. However, as the landscape of family law evolves rapidly in the US and beyond, we must be ready and willing to evolve our understanding of marital consent.

STATUTE COMPENDIUMS

A: Marriage Age Exceptions

B: Annulment Based on Infancy

C: Ordinary and Automatic Marriage Emancipation of Minors

D: Marital Rape Exceptions for Infancy and Incapacity

E: Forced Marriage Criminal Laws

F: Marital Restrictions Based on Mental Disability

G: Annulment Based on Force and Fraud

A: Marriage Age Exceptions

State	Citation(s)	Minimum Marriage Age	Parental Consent	Judicial Approval - Mandatory	Judicial Approval- Supplementary	Romeo and Juliet	Emancipation	Pregnancy	Religious Ceremony
AL	AL Code § 30-1-5.	16	Yes	No	No	No	No	No	“If a person intending to marry is at least 16 years of age and has not had a former wife or husband, the guardian of the minor to the marriage must be present.”
AK	AK Stat. § 25.05.171	16	Yes	Yes	No	No	No	Yes	“A superior court judge may grant permission for a person under the age of 16 but is under the age of 18 to marry if the judge is satisfied that the officer to issue the license if the judge is satisfied that the parents and minor are given the opportunity to be heard, the marriage is in the best interest of the minor, and the marriage is not more than three years after the person has given their consent; or (2) the person is not a minor, capriciously withholding consent; But if the judge is in disagreement among themselves on the matter.”
AZ	A.R.S § 25-102.	16	Yes	No	No	No	Yes	No	“A person who is at least sixteen years of age may marry only if one of the following conditions has been met: 1. The person has received an emancipation order from a court in another state and the person is at least three years older than the person. 2. The person is at least three years older than the person and the person consents to the marriage. 3. The person is not more than three years older than the person.”
AR	AR Code § 9-11-102; § 9-11-103; § 9-11-209.	16	Yes	Yes	No	No	No	No	“[A] male or female who is at least 16 years of age and is at least 18 months of age of eighteen (18) years may contract marriage without the consent of the guardian of the contracting party shall furnish the presence of a notary public that the guardian of the contracting party consents to the marriage.” “If an application for a marriage license is filed by parties are under eighteen (18) years of age and the female is pregnant, before the circuit court of the district where the marriage is being made.”
CA	Cal. Fam. Code § 301; § 302; § 303; § 304.	0	Yes	No	Yes	No	No	No	“(a) An unmarried person under 18 years of age may obtain a marriage license upon obtaining a court order from the court of competent jurisdiction authorizing the person or persons to marry, in accordance with Section 304. (b) The court order and written consent of the guardian of each underage person shall be filed with the county clerk and a certified copy of the order shall be filed with the county clerk at the time the marriage license is issued.” “If it appears to the satisfaction of the court that the minor requires a written consent of the parent or has no parent capable of consenting to the issuance of a marriage license, the court may consent to the minor to marry, in accordance with Section 304.”
CO	C.R.S § 14-2-106; § 14-2-108.	16	No	Yes	No	No	No	No	“[T]he county clerk shall issue a license upon being furnished: (I) Satisfactory evidence that the marriage will have attained the age of 16 years when the license becomes effective; or, if over the age of 16 years, the license becomes effective; or, if over the age of 16 years, the license becomes effective; or, if over the age of 16 years, the license becomes effective.”

									attained the age of eighteen years, has judicial capacity, and is not a person under section 14-2-108...” “The juvenile court, as defined in section 14-2-108, if a petition has been made to notify the parents or legal guardian of the minor party, may order the county clerk and recorder to issue a marriage license and a person sixteen or seventeen years of age.”
CT	C.G.S § 46b-20a; § 46b-150d.	18	No	No	No	No	No	No	“A person is eligible to marry if such person is at least 18 years of age”
DE	D. Code § 13-1-123.	18	No	No	No	No	No	No	“No individual under the age of 18 shall be permitted to marry.”
FL	FL Stat. § 741.04.	17	Yes	No	No	Yes	No	No	“A county court judge or clerk of the circuit may issue a license to marry to any person younger than 18 years of age, provided that at least 17 years of age and provides the written consent of the legal guardian, which is acknowledged by a notary public. The person taking acknowledgments and administer oaths for the marriage is not more than 2 years older than the person getting the marriage.”
GA	GA Code § 19-3-2; § 19-3-36.	17	No	No	No	Yes	Yes	No	“If either applicant for marriage is 17 years of age or older, such applicant was emancipated by operation of law, or the applicant filed with the court as provided in Article 1 of Chapter 11, he or she may be required before a license may be issued. The older party to the marriage cannot be more than four years older than the younger party to the marriage.”
HI	Haw. Rev. Stat. § 572-1; 572-2; § 572-9; § 572-10.	15	Yes	Yes	No	No	No	No	“Each of the parties at the time of contracting the marriage shall be at least 15 years of age; provided that with the written consent of the court of the circuit within which the minor resides, a minor under the age of sixteen years, but in no event less than 15 years of age, may marry, subject to section 572-2...” “Whenever any person who is under the age of 18 years obtains the written consent of his or her parents, or guardian, or the care and custody he or she may be, shall acquire the legal capacity to obtain a license to marry. No license shall be issued by the court in the jurisdiction of the family court without the written consent of the court.”
ID	I.C.A.S § 32-202.	16	Yes	No	No	Yes	No	No	“A minor under eighteen (18) and not less than sixteen (16) years of age may not contract marriage with a person of the opposite sex if there is an age difference of three (3) years or greater. A marriage license for a minor under the age of eighteen (18) years of age shall be issued where there is an age difference between the parties. Provided that if the male party to the marriage is at least the age of eighteen (18) and not less than sixteen (16) years of age, the license shall be issued if the female party to the contract is under the age of sixteen (16) years of age, the license shall be issued with the consent in writing duly acknowledged and signed by the parent or guardian of any such person if there be either parent or guardian. Such license may be issued, if the male be under the age of sixteen (16) years of age and the female be under the age of less than sixteen (16) years of age, unless either party files with the county recorder his or her original birth certificate or other proof of age acceptable to the county recorder. If the female is under the age of sixteen (16), or the male is under the age of sixteen (16), the license shall not be issued.”
IL	750 I.L.C.S § 5/203; § 5/208.	16	Yes	No	Yes	No	No	No	“[T]he county clerk shall issue a license to marry to any person who is at least 16 years of age upon being furnished: (1) satisfactory

									A minor under the age of sixteen must also marry from the judge of the court exercising jurisdiction in the parish in which the minor resides or the marriage must be performed."
ME	M.R.S. Title 19-A § 652.	18	No	No	No	No	No	No	"A marriage license may not be issued to p
MD	M.F.L.C § 2-301.	17	Yes	No	No	No	No	Yes	"An individual 17 years old may not marry if: (i) the individual has the consent of each living parent or the custodian of the individual; or (ii) if the individual does not have the consent of a parent or item, either party to be married gives the clerk of the circuit court, a physician, licensed physician assistant, or notary public that the physician, physician assistant, or notary public that a woman to be married and has found that she is not pregnant a child..."
MA	M.G.L 207 § 7.	18	No	No	No	No	No	No	"A magistrate or minister shall not solemnize a marriage if the intended marriage is under the age of 18."
MI	M.C.L § 551.103.	18	No	No	No	No	No	No	"An individual who is 18 years of age or older"
MN	Minn. Stat. § 517.02.	18	No	No	No	No	No	No	"A person who has attained the full age of majority is competent to contracting into a civil marriage, if otherwise qualified."
MS	Miss. Code § 93-1-5.	0	Yes	Yes	Yes	Yes	No	No	"Every male who is at least seventeen (17) years of age and is at least fifteen (15) years old shall be capable of contracting marriage. However, males and females under the age of fifteen years must furnish the circuit clerk satisfactory evidence of marriage by the parents or guardians of the male." If the male applicant is under seventeen (17) years of age, and under fifteen (15) years of age, and satisfactory evidence of marriage by the judge of any circuit, chancery or county court, or by the judge and that the parties desire to be married to each other or to other person in loco parentis of the person to be married to the marriage, then the judge of any such court, if the residence of the parties resides may waive the minimum age and the written instrument authorize the clerk of the circuit court to issue a license to the parties if they are otherwise qualified."
MO	MO Rev. Stat. § 451.090.	18	No	No	No	No	No	No	"No recorder shall issue a license authorizing a marriage of a female under the age of eighteen years."
MT	Mont. Code § 40-1-202; § 40-1-213; § 40-1-402.	16	Yes	Yes	No	No	No	No	"[T]he clerk of the district court shall issue a marriage license and a certificate form upon being furnished: satisfactory evidence that the marriage will have attained 18 years of age; the license is effective or will have attained 16 years of age; and judicial approval as provided in 40-1-21..." "The district court may order the clerk of the district court to issue a marriage license and a marriage certificate to a person who has no parent capable of consenting to the marriage, if the consent of both parents or of the parent or guardian, authority, and control to the party's marriage is given by the authority of the party's guardian..."
NE	Neb. Rev. Stat. § 42-102; § 42-105; § 43-2101.	17	Yes	No	No	No	No	No	"When either party is a minor, no license shall be issued without the written consent under oath of: (1) Either one or both of the parents are living together;(2) the parents are living separate and apart; (3) the minor, if the parents are living separate and apart; (4) the surviving parent, if one of the parents of such minor is deceased; (5) the guardian, conservator, or person under whom the minor is living."

									minor may be, if both parents of such minor are deceased; guardian, conservator, or person having custody of the minor...”
NV	Nev. Rev. Stat § 122.020; § 122.025.	17	Yes	Yes	No	No	No	No	“A minor who is 17 years of age may marry with the consent of: (a) Either parent; or (b) The minor’s legal guardian, and the minor also obtains authorization from the court under this section. In extraordinary circumstances, a district judge may authorize the marriage of a minor who is 17 years of age if the judge finds evidence, after an evidentiary hearing, that the proposed prospective marriage provide sworn testimony that the prospective marriage are residents of Nevada, that the best interests of the minor; and (c) The marriage is in paragraph (a) or (b) of subsection 1.”
NH	NH Rev. Stat. § 457:7.	18	No	No	No	No	No	No	“The age of consent shall be in the manner provided by law.”
NJ	NJ Rev. Stat. § 37:1-6.	18	No	No	No	No	No	No	“A marriage or civil union license shall not be issued to anyone under the age of 18 years.”
NM	NM Stat. § 40-1-6.	0	Yes	Yes	No	No	Yes	No	“The county clerk shall not issue a marriage license to any person sixteen or seventeen years of age without the laws of this state to solemnize marriages. Any person sixteen or seventeen years of age must obtain the written consent of each of the minor's parents, the minor's certificate of birth, or the disapproval of such person upon request of a parent, for a good cause shown, and a certified copy of the consent with the county clerk...”
NY	NY Dom. Rel. Code Art. 3, § 15-a.	18	No	No	No	No	No	No	“Any marriage in which either party is under the age of 18 hereby prohibited.”
NC	NC Gen. Stat. § 51-2; § 51-2.1.	16	Yes	No	Yes	Yes	Yes	No	“Persons over 16 years of age and under 18 years of age, no more than four years older, and the same sex, may enter into the marriage, only after there has been a written consent, certified copy of an order issued by the court as provided in G.S. 51-2.1, or a writ of habeas corpus having been signed by the appropriate authority. (1) By a parent having full or joint legal custody; (2) By a person, agency, or institution designated as guardian of the underage party. Such written consent shall not be required if the person has a certificate of emancipation issued pursuant to the General Statutes or a certified copy of a court order of emancipation from this or any other jurisdiction.”
ND	N.D.C.C § 14-03-02; § 14-03-17; § 14-10-07.	16	Yes	No	No	No	No	No	“Any unmarried person of the age of 16 or older, who is otherwise disqualified, is capable of entering into a marriage. If a person is sixteen to eighteen years of age, the marriage may not be issued without the consent of the parent or guardian.”
OH	Ohio. Rev. Code § 3101.01; § 3101.02.	17	Yes	Yes	No	Yes	No	No	“A minor shall first obtain the consent of the parent, parent who is designated the legal guardian of the minor by a court of competent jurisdiction, or the guardian of the property of the minor, before entering into a marriage.”

									following who has been awarded permanent custody and is exercising juvenile jurisdiction...”
									“(A) If both persons to be joined in marriage are at least eighteen years of age, they may be joined in marriage only if the judge or other officer authorized to issue marriage licenses to the marriage under section 3101.04 of the Revised Code.(B) If only one person is the age of seventeen years, the person may be joined in marriage only if both of the following conditions are met:(1) The person has filed a consent to the marriage under section 3101.04 of the Revised Code.(2) The other person to be joined in marriage is at least eighteen years older.”
OK	Okla. Stat. Title 43 § 3.	0	Yes	No	Yes	No	No	Yes	“Except as otherwise provided by this subsection, a person who is at least eighteen (18) years shall enter into the marriage only if the parent or guardian of such person has given the consent in writing to the authority issuing such license... if the parent or guardian of the State of Oklahoma, upon the written consent of the parent or guardian executed before a judge or clerk of a court of competent jurisdiction.”
OR	Or. Rev. Stat. § 106.010; § 106.050; § 106.060.	18	No	No	No	No	No	No	“A marriage license shall not be issued without the written consent of the parent or guardian, if any, of an applicant who is under the age of 18 years.”
PA	Penn. Con. Stat. Title 23 § 1304(b).	18	No	No	No	No	No	No	“No marriage license may be issued if either party is under 18 years of age.”
RI	RI Gen. Laws § 15-2-14.	18	No	No	No	No	No	No	“A marriage license shall only be granted to a person who is at least the age of eighteen (18) years shall be deemed to be of legal age § 15-12-1.”
SC	SC Code § 20-1-250.	16	Yes	No	No	No	No	No	“When either applicant is between the ages of sixteen (16) and eighteen (18) years, the applicant resides with father, mother, other relative, or guardian, the judge or other officer authorized to issue marriage licenses shall not issue a marriage license for the marriage until furnished with written consent of father, mother, other relative, or guardian of the applicant.”
SD	SD Cod. L. § 25-1-9	16	Yes	No	No	No	No	No	“If either applicant for a marriage license is under the age of eighteen, that applicant shall submit to the clerk of the court a statement of consent to marry from one parent or guardian of the applicant.”
TN	Tenn. Code § 36-3-105.	17	No	No	No	Yes	No	No	“It is unlawful for any county clerk or deputy clerk to issue a marriage license to any person where: One (1) is under the age of at least seventeen (17) years of age but less than eighteen (18) years of age and the other contracting party is at least four (4) years older than the contracting party.”
TX	Tex. Fam. Code § 2.101.	16	No	No	No	No	Yes	No	“A county clerk may not issue a marriage license to a person who is under 18 years of age, unless each underage applicant has been granted by this state or another state a certificate of emancipation or disabilities of minority of the applicant for at least one year before the date of the marriage.”
UT	Utah Code § 30-1-9.	16	Yes	No	No	Yes	No	No	“For purposes of this section, "minor" means a person who is under 18 years old...(a) If at the time of applying for a marriage license, the minor, and not before the minor is married, the parent or guardian of the minor, without the signed consent of the minor's parent or guardian, shall submit a written authorization for a minor to marry in writing to the clerk...The judge or court clerk shall not issue a marriage license if the parties to the marriage is more than four years apart in age.”
VT	18 V.S § 5142.	18	No	No	No	No	No	No	“The following persons are not authorized to issue a marriage license: (1) any person not knowingly issue a civil marriage license to a person under 18 years of age.”
VA	VA Code § 20-48.	18	No	No	No	No	No	No	“The minimum age at which persons may marry is 18 years of age.”

			behalf the proceeding is commenced was under 18 years of age, until the marriage pursuant to Section 302 or 303.”
CO	C.R.S. § 14-10-111	Limited	“A party was under the age as provided by law and did not have the guardian or judicial approval as provided by law.”
CT	C.G.S. § 46b-40	Unclear	“An annulment shall be granted if the marriage is void or voidable under the law of the state in which the marriage was performed.”
DE	D. Code § 13-1506(a)(5)	Limited	“The Court shall enter a decree of annulment of a marriage entered into by a party who was less than legal age and did not have the consent of her parents or guardian or judicial approval as provided by law...”
FL	‘Annulment’ (Florida Courts) < https://www.flcourts.gov/content/download/862646/file/Everything%20Else%20-%20ANNULMENT.pdf > accessed 10 March 2025	Limited	No specific statutory law. Secondary reports indicate infancy will be a ground for annulment
GA	GA Code § 19-5-3(4)	Unclear	“The following grounds shall be sufficient to authorize the granting of an annulment: incapacity at the time of the marriage...”
HI	Haw. Rev. Stat. § 580-21(5)	Limited	“The family court, by a decree of nullity, may declare void the marriage on the following causes, existing at the time of the marriage: That the party was not attained the legal age of marriage...”
ID	I.C.A.S § 32-501(5)	Limited	“A marriage may be annulled for any of the following causes, existing at the time of the marriage: That the party in whose behalf it is sought to have the marriage annulled was incapable of legal consent, and such marriage was contracted without the consent of the party, guardian, or persons having charge of him or her; unless, after attaining majority, such party for any time freely cohabits with the other as husband or wife.”
IL	I.L.C.S § 5/301(1)	Limited	“The court shall enter its judgment declaring the invalidity of a marriage (or annulment) entered into under the following circumstances: a party was incapable of legal consent and did not have the consent of his parents or guardian or judicial approval.”
IN	Ind. Code § 31-11-9-2; § 31-11-9-3	Yes	“A marriage is voidable if a party to the marriage was incapable because of incompetency of contracting the marriage.”
IA	Iowa Code § 598.29	No	N/A
KS	Kan. Stat. § 23-2702	Unclear	“The district court shall grant a decree of annulment of any marriage entered into on the following grounds: the marriage is void for ‘any reason’.”
KY	K.R.S. § 403.120 (1)(a)	No	N/A
LA	LA Title IV: Chapter 2 Art 95	Unclear	“A marriage is relatively null when the consent of one of the parties was not given. Such a marriage may be declared null upon application of the party who was not free. The marriage may not be declared null if that party confirms the marriage after recovering his liberty or regaining his discernment.”
ME	M.R.S. Title 19-A, §752	No	N/A
MD	M.F.L.C § 2-301; § 2-406.	No	N/A
MA		No	N/A
MI	M.C.L. § 552.37	Unclear	“A party to a marriage who, at the time of the marriage, was not capable of contracting and who later becomes capable in law of contracting may bring an action to annul the marriage. The court shall not, however, annul the marriage if the party has cohabited as husband and wife after the party became capable in law.”
MN	Minn. Stat. § 518.02	Yes	“A marriage shall be declared a nullity under the following circumstances: the party was incapable of capacity to consent to the marriage at the time the marriage was solemnized; mental incapacity or infirmity...and there was no subsequent voluntary agreement by the parties...”
MS	Miss. Code § 93-7-3(d)	Yes	“A marriage may be annulled for any one of the following causes existing at the time of the marriage ceremony... in the absence of ratification... When either party is incapable, from want of age or understanding, of consenting to an annulment... from physical causes of entering into the marriage state...”

SD	SD Cod. L § 25-3-4	Limited	“A marriage may be annulled by an action in the circuit court to obtain the party in whose behalf it is sought to have the marriage annulled consent at the time of the marriage, and such marriage was contracted by his or her parents or guardian or person having charge of him or her at the age of consent, such party for any time freely cohabitated with the other party.”
TN	Goldstein A, ‘Am I Eligible for an Annulment in Tennessee?’ (Cole Law 2022) < https://www.colelawgroup.com/blog/am-i-eligible-for-an-annulment-in-tennessee/#_edn2 >	Yes	No statutory provision. Secondary sources indicate infancy as ground for annulment.
TX	Tex. Fam. Code § 6.102	Limited	“The court may grant an annulment of a marriage of a person 16 years of age or older under 18 years of age that occurred without parental consent or without the consent of the person.”
UT		No	
VT	V.S Title 15 § 512	Yes	“The civil marriage contract may be annulled when, at the time of marriage, either party was under the age of 16 years or was physically or mentally incapable of consenting to a civil marriage.”
VA	VA Code § 20-45.1	Limited	“All marriages solemnized on or after (i) July 1, 2016, when either party was under the age of 18 at the time of the solemnization, under the age of 18 and have not been required by § 20-48 or (ii) July 1, 2024, when either or both of the parties were under the age of 18 at the time of the solemnization, under the age of 18 shall be void from the time they were solemnized, without the need for a decree of divorce or nullity.”
WA	Wash. Rev. Code § 26.04.130	Yes	“When either party to a marriage shall be incapable of consenting thereto or a sufficient understanding...such marriage is voidable, but only as to the party so laboring under the disability...”
WV	WV Code §48-3-103	Yes	“The following marriages are voidable and are void from the time they are solemnized: judgment order of nullity: was under the age of consent...”
WI	Wis. Stat. § 767.313	Yes	“A court may annul a marriage upon any of the following grounds: (1) the party did not consent to the marriage at the time the marriage was solemnized...”
WY	WY Stat. § 20-2-101	Yes	“Marriages contracted in Wyoming are void without any decree of divorce if either party is under sixteen years of age at the time of contracting the marriage; or if the marriage was solemnized when either party was sixteen or seventeen years of age and did not have the consent, if they separated during nonage and did not cohabit together.”

C: Ordinary and Automatic Marriage Emancipation of Minors

State	Citation(s)	Emancipation by Court Order?	Minimum Age for Ordinary Emancipation	Automatic Emancipation Upon Marriage?	Minimum Marriage Age (See Comp.A)	
AL	AL Code § 26-13-1; § 30-02-6; <i>Anderson v Loper</i> (1996) 689 So 2d 118 (Alabama Civil Appellate Court)	No	N/A	No	16	“Whenever the father or the mother of a minor files a petition with the court, in view of the minor's best interests, to be relieved from the disabilities of minority, and the court is satisfied that it is to the best interests of the minor, the court may grant the petition.” “A husband or wife under 18 years of age may file a complaint for any purpose without the intervention of a guardian ad litem, and if over 18 years of age, may defend any action brought against him or her without the intervention of a guardian ad litem.”
AK	AK Stat. § 25.20.020; § 09.55.590	Yes	16	Yes	16	“A person arrives at the age of majority according to law, unless the law provides otherwise. The age of consent as defined in this chapter is the age at which a person reaches majority upon the day of his or her consent.” “A minor who is a resident of this state, is at least 16 years of age, who is living separately from his or her parents, is a guardian of the minor, capable of managing one's own financial affairs, and such a minor, may petition the court to be relieved of the disabilities of minority for certain purposes.”
AZ	A.R.S § 44-132; § 12-2451.	Yes	16	Yes	16	“Notwithstanding any other law to the contrary, any minor in title 36, chapter 20, article 1, who has obtained written consent which consent may otherwise be required by law, to be emancipated minor, any minor who is married or any homeless minor, may be relieved of the disabilities of minority by the furnishing of hospital, medical, dental, and other services, and such consent shall not be subject to the disabilities of minority.” “A minor who wishes to be emancipated may petition the court for an emancipation order with the court's approval. The court in which the minor resides shall have jurisdiction if the minor is at least sixteen years of age and a resident of this state. 3. The minor must be at least sixteen years of age and must acknowledge in writing that he or she understands information that is provided to him or her, explains the rights and obligations of the minor, and the potential risks and consequences of emancipation.”
AR	AR Code § 9-27-362; §25-503(O); <i>Guthrie v Guthrie</i> (2015) 455 SW3d 844 (Arkansas Court of Appeals)	Yes	17	Yes	16	“The court may emancipate a minor upon the filing of a petition if the petitioner shows by a preponderance of evidence that: (A) The juvenile is at least 16 years of age; (B) The juvenile is living separately from his or her parent, legal guardian, or other person; (C) The juvenile has an appropriate person who has been managing or has taken responsibility for the juvenile's financial affairs; (E) The juvenile is engaged in a trade, business, or profession such as employment or a trade; (F) The juvenile has health insurance coverage or a reasonable plan for health needs; (G) The juvenile is capable of managing his or her own financial affairs; and (H) The juvenile is capable of understanding the rights and obligations of emancipation.”

						compulsory school attendance law in the best interest of the juvenile.” “For the purposes of this chapter, the date of the child's marriage.”
CA	Cal. Fam. Code § 7002; § 7120	Yes	14	Yes	0	“A person under the age of 18 years who is subject to any of the following conditions is deemed to be emancipated: (a) The person has entered into a valid marriage or has established a valid domestic partnership, whether the marriage or the domestic partnership has been dissolved. (b) The person is on active duty in the Armed Forces of the United States. (c) The person has made a declaration of emancipation pursuant to Section 7120.5.” “The court shall sustain the petition for emancipation of a person described by Section 7120.5 if the court finds that it is not be contrary to the minor's best interests.”
CO	C.R.S. § 19-1-103; § 14-10-115(13)(a)(IV)	Yes	15	Yes	16	“Independent living" means a form of living arrangement where the home arranged and supervised by the state or human or social services where the child is living in a living situation designed to promote the child's self-sufficiency and emancipation.” “If the child marries, the child shall be deemed emancipated as of the date of the marriage. If the marriage is later dissolved, or declared invalid, child shall not be deemed emancipated.”
CT	Conn. Gen. Stat. Ann. § 46b-150	Yes	16	No	18	“Any minor who has reached such age as to be capable of self-support and is residing in this state, or any minor who is married, may petition the superior court or probate court for the district in which the minor resides, or the parents or guardian of such minor, for a declaration that the minor named in the petition is emancipated.”
DE	N/A	No	N/A	No	18	N/A
FL	Fla. Stat. § 743.015(1); § 743.01	Yes	16	Yes	17	“A circuit court has jurisdiction to declare the nonage of a minor age 16 or older if a petition filed by the minor's natural parent or guardian is none, by a guardian ad litem. The petition shall contain the following: (1) a statement of the minor's character, habits, and mental capacity for business, industry, and the needs of the minor with respect to education, medical care, and other necessities; and (2) a declaration that the minor is capable of self-support. “The disability of nonage of a minor who is married or subsequently becomes married, whose marriage is dissolved, or who is withdrawn from the marriage, shall be removed.”
GA	GA Code § 15-11-721; § 15-11-201	Yes	16	Yes	17	“A child seeking emancipation shall file a petition in the juvenile court in the county where the child resides. The petition shall be signed by the child petitioner and shall include...A declaration of the child demonstrating the ability to manage his or her own affairs together with any information necessary to support the declaration...”
HI	Haw. Rev. Stat. § 577-25	Yes	16	Yes	15	“Any law to the contrary notwithstanding, a minor shall be deemed to be emancipated if the minor is 16 years of age or older and is capable of self-support.”

						valid marriage pursuant to declaration of emancipation to this section. A minor who has reached t be emancipated may file a emancipation with the fam minor resides.”
ID	I.C.A.S § 15-1-201	No	N/A	Yes	16	“Emancipated minor” shall been married.”
IL	750 I.L.C.S § 30/3-2; § 30/4; <i>In re Marriage of Baumgartner</i> (2010) 930 NE2d 1024 (Illinois)	Yes	16	No	16	“Mature minor” means a p under the age of 18 years w capacity to manage the min partially independent of the
IN	Ind. Code § 31-16-6-6; § 31-34-20-6; § 31-37-19-27(a)(1); §31-11-1-7	Yes	15	Yes	16	“The juvenile court for the emancipate the child under petition brought by the child [T]he court may grant the p (1) that emancipation is in (2) that the child: (A) wish and protection and no long (B) has sufficient money fo understands the consequen control and protection; and independent living.” “A minor who is sixteen (1 may petition the juvenile co resides for an order grantin completely emancipating th
IA	Iowa Code § 232C.1(1); § 599.1	Yes	16	Yes	16	“A minor who desires to be petition for an order of ema to this section shall contain support the petition includi following:(1) The minor ha sufficiency, including proo support, which does not inc federal, state, or local gove demonstrated an ability to minor.(3) The minor has de commitment to obtain and training, or employment.(4 necessary to support the pe
KS	Kan. Stat. § 38-101; § 38-109	Yes	0	Yes	15	“Any minor, desiring to ob purposes named in the prec next friend, file a petition i which such minor shall res Upon proof in open court o petition and that said petitio able to transact his or her o petitioner shall be promote discretion, order and decree exercise the rights of major mentioned in K.S.A. 38-10 supplemental thereto”

						“The period of minority extends in eighteen (18) years, except that ev of age or over who is or has been the age of majority in all matters r rights, liabilities and the capacity
KY	K.R.S § 402.205(7); <i>Carricato v Carricato</i> (1964) 384 SW 2d 85 (Kentucky Court of Appeals)	Yes	0	Yes	17	“The granting of a petition for per subsection (1) of this section shall minority. A minor emancipated by considered to have all the rights an except for specific constitutional including but not limited to voting beverages, and other health and sa him or her because of his or her ag “A minor who is seventeen (17) y family court in the county in whic District Court in that county if a fa been established in that county, fo to marry.”
LA	La. Civ. Code Art. 366; Art. 367	Yes	16	Yes	16	“A court may order for good caus emancipation of a minor sixteen y judicial emancipation confers all e person emancipated, unless otherw “A minor sixteen or seventeen ye by marriage. Termination of the m emancipation by marriage. Emanc be modified or terminated.”
ME	M.R.S. tit. 15, § 3506-A; ‘Emancipation’ (Maine Judiciary Branch) <					

						emancipated for the purposes of a court of competent jurisdiction.
MO	MO Rev. Stat. § 452.340(3); <i>French v French</i> (1980) 599 SW2d 40 (Missouri Court of Appeals)	Yes	0	Yes	16	No specific statutory provisions through state support law and
MT	Mont. Code § 41-1-501(1)	Yes	16	No	16	“A youth who is 16 years of age the department of public health petition the court for an order of the youth.”
NE	Neb. Rev. Stat. § 43-4802; § 43-2101	Yes	16	Yes	17	“A minor who is at least sixteen living apart from his or her parents a legal resident may file a petition her county of residence for emancipation.” “All persons under nineteen years of age are minors, but in case any person is under sixteen years, his or her minority extends to sixteen years.”
NV	Nev. Rev. Stat. § 129.080; <i>Kirkpatrick v Eight Judicial District Court</i> (2003) 119 Nev 66 (Nevada)	Yes	16	Yes	17	“Any minor who is at least sixteen living apart from his or her parents a resident of the county, may petition the county for a decree of emancipation.” “Marriage is generally sufficient for emancipation.”
NH	NH Rev. Stat. § 21-B:3; § 21-B:1; § 457:4	Yes	0	Yes	18	“A minor who is 16 years of age or older for an order granting limited emancipation.” “The certificate of marriage is sufficient for emancipation.”
NJ	N/A	No	N/A	No	18	N/A
NM	NM Stat. § 32A-21-3	Yes	16	Yes (16+ only)	0	“An emancipated minor is a minor older who: A. has entered into the marriage was terminated with any of the armed forces; B. has received a declaration of Emancipation of Minors Act.”
NY	N/A	No	N/A	No	18	N/A
NC	N.C. Gen. Stat. Ann. § 7B-3500; § 7B-3509	Yes	16	Yes	16	“Any juvenile who is 16 years of age resided in the same county or territory within the boundaries of that county for a judicial decree next preceding the filing of that county for a judicial decree.” “A married juvenile is emancipated.”
ND	N.D.C.C. § 14-03-02; § 50-25.2-01	No	N/A	Yes	16	“‘Adult’ includes a minor emancipated.”
OH	<i>Andrus v Andrus</i> (1982) Ohio Appellate Court L-80-322; <i>In re Montgomery</i> (1988) CA8709-123 (Ohio Court of Appeals)	No	N/A	Yes	17	No specific statutory provisions through state case law.
OK	Okla. Stat. Title 10 § 91; <i>Daubert v Mosley</i> (1971) 487 P2d 353 (Oklahoma)	Yes	0	No	0	“The district courts shall have the rights of majority concerning the rights of majority concerning empower any person, under the law to transact business in general.”

						same effect as if such act or thing that age; and every act done by a p have the same force and effect in the age of majority.”
OR	Or. Rev. Stat. § 109.520; § 419B.558	Yes	16	Yes	17	“The juvenile court in its discretion emancipation where the minor is a court finds that the best interests emancipation. In making its determination into consideration the following factors of the minor consents to the proposed Whether the minor has been living and is substantially able to be self-supported without parental guidance Whether the minor can demonstrate court that the minor is sufficiently manage the minor's affairs without “Except as provided in ORS 653.0 deemed to have arrived at the age married according to law.”
PA	N/A	No	N/A	No	18	N/A
RI	N/A	No	N/A	No	18	N/A
SC	SC Code § 59-112-10.F; § 44-41-10(n); <i>Purdy v Purdy</i> (2003) 578 SE2d 30 (South Carolina Court of Appeals)	Yes	0	Yes	16	No specific statutory provision. Emancipation through state benefit and case law
SD	SD Cod. L. § 25-5-24; § 25-5-26	Yes	16	Yes	16	“Any person under the age of eighteen entered into a valid marriage, when terminated by dissolution; or (2) If the armed forces of the United States received a declaration of emancipation an emancipated minor.” “A minor may petition the circuit he resides for a declaration of emancipation be verified and shall set forth with the following: (1) That he is at least sixteen (2) That he willingly lives separately guardian with the consent or acquiescence guardian; (3) That he is managing (4) That the source of his income activity declared to be a crime by Dakota or the laws of the United States
TN	Tenn. Code § 29-31-101; <i>Morgan v Morgan</i> (1988) WL130340 (Court of Appeals of Tennessee)	Yes	N/A	Yes	17	“The chancery court of a county in the chancellor in vacation may remove minority...” Emancipation through marriage is but is established through state case
TX	Tex. Fam. Code § 101.003; § 31.001	Yes	16	No	16	“A minor may petition to have the removed for limited or general purposes (1) a resident of this state; (2) 17 years of age and living separate and parents, managing conservator, or supporting and managing the minor

D: Marital Rape Exceptions for Infancy and Incapacity

State	Citation(s)	Minimum Marriage Age (See Comp. A)	Minimum Age of Sexual Consent	Marriage Exception for Age?	Marriage Exception for Disability?	Relevant Text
AL	AL Code § 13A-6-60; § 13A-6-61; § 13A-6-62; § 13A-6-67; § 13A-6-69.1	16	12	Yes	Yes	“Deviate Sexual Intercourse: Any sexual contact between persons not married to each other involving the sexual organs of one person and the mouth of another person.” Sexual Contact: Any touching of the sexual or other intimate parts of a person not married to the other for the purpose of gratifying the sexual desire of either person. “A person commits the crime of sexual assault in the second degree if: (1) He subjects another person to sexual contact if the person is incapable of consent by reason of being less than 16 years old; or (2) He is at least 16 years old, but more than 12 years younger than the other person, and subjects another person to sexual contact if the person is incapable of consent by reason of being less than 16 years old.”
AK	AK Stat. § 11.41.434; § 11.41.436; § 11.41.438; § 11.41.440; § 11.41.445	16	16	Yes	No	“In a prosecution under AS 11.41.434, 11.41.436, 11.41.438, 11.41.440, or 11.41.445, it is an affirmative defense that, at the time the offense was committed, the victim was the legal spouse of the defendant and the offense was committed without the consent of the victim.”
AZ	A.R.S § 13-1405; § 13-1407; § 13-1410	16	15	Yes	No	“It is a defense to a prosecution pursuant to section 13-1405 that the person was the spouse of the victim at the time of commission of the act.”
AR	AR Code § 5-14-103; § 5-14-125; § 5-14-126; § 5-14-127	16	14	Yes	No	“A person commits sexual assault in the second degree if the person...Being a minor, engages in sexual contact with another person who is: Less than fourteen (14) years of age; or the person's spouse.”
CA	C.P.C §261.5	0	18	Yes	No	“Unlawful sexual intercourse is an offense if it is accomplished with a person who is under the age of 18 years, the perpetrator, if the person is a minor, is at least 3 years older than the victim.”
CO	C.R.S. § 18-3-402; § 18-3-405; § 18-3-409	16	17	Yes	No	“Any actor who knowingly inflicts sexual penetration on a victim commits sexual assault in the second degree if the actor knows that the victim submits erroneously to the act, believing to be the victim's spouse; or At the time of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim; or At the time of the act, the victim is at least fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim.”
CT	C.G.S § 53a-65; § 53a-67; § 53a-70; § 53a-71; § 53a-73a	18	16	No	Yes	“ No spouse or cohabitor shall commit sexual assault in the second degree against such other spouse or cohabitor if the actor uses force against such other spouse or cohabitor and the actor reasonably causes such other spouse or cohabitor physical injury.”
DE	D. Code Title 11 § 5-762; 5-768; 5-769; 5-770; 5-771; 5-772; 5-773	18	16	Yes	No	“A person is guilty of rape in the second degree if the person... Intentionally engages in sexual intercourse with another person, and the victim has not attained his or her eighteenth birthday, and the person knows that the victim is under the age of 18 years, except that such intercourse shall not be a crime if the person and person are married at the time of the act.”

FL	FL Stat. § 743.01; § 794.05; § 800.04	17	16	No	No	N/A
GA	GA Code § 16-6-1; § 16-6-3	17	16	Yes	No	“A person commits the offense of sexual intercourse with a minor if the person engages in sexual intercourse with a person who is at least 16 years and not his or her spouse; provided that the person shall be had for this offense as a victim.”
HI	Haw. Rev. Stat. § 707-730; § 707-732	15	14	Yes	No	“A person commits the offense of sexual intercourse with a minor in the second degree if the person: Knowingly engages in sexual intercourse with a person who is at least sixteen years old; provided that the person is not married to the minor...” “A person commits the offense of sexual intercourse with a minor in the third degree if the person: Knowingly engages in sexual intercourse with a person who is at least four years old or causes such a person to engage in sexual intercourse with the actor; provided that the actor is not married to the minor...”
ID	I.C.A.S. § 18-6101; § 18-6107	16	18	Yes	Yes	“Rape is defined as the penetration of the victim’s anal or vaginal opening with the perpetrator’s penis, or the insertion of any object into the victim’s anal or vaginal opening with the intent to commit sexual intercourse, and the perpetrator is one (1) of the following circumstances: (1) Where the victim is under the age of sixteen (16) years, the perpetrator is eighteen (18) years of age or older, and the perpetrator is not lawfully married to the victim; (2) Where the victim is sixteen (16) years of age, the perpetrator is three (3) years older than the victim, and the victim is not lawfully married to the perpetrator; (3) Where the victim is incapable of consenting to sexual intercourse, due to any cause including but not limited to mental illness, mental disability or physical incapacity, temporary or permanent, of the victim. “No person shall be convicted of rape if the victim is that person’s spouse, except as provided in subsections (4), (5), (6) and (7) of this Code.”
IL	I.L.C.S 5/11-1.10; 5/11-1.30; 5/11-1.40; 5/11-1.50 ;5/11-1.60	16	17	No	No	N/A
IN	Ind. Code § 35-42-4-3; § 35-42-4-9	16	14	Yes	No	“A person at least eighteen (18) years of age who intentionally performs or solicits another person to perform sexual conduct (as defined in § 35-42-4-1) with a minor, a Level 5 felony, if the person has never been married.”
IA	Iowa Code § 709.3; § 709.4	16	14	Yes	Yes	“A person commits sexual abuse if the person performs a sex act with a person who is at least sixteen (16) years of age under the following circumstances... The act is committed while the person is time cohabiting as husband and wife. The following circumstances are true: 1) The other person is at least sixteen (16) years of age and is incapable of consenting to sexual intercourse which precludes the person from being married; 2) The person is fourteen or fifteen years of age.”
KS	Kan. Stat. § 21-5503; § 21-5506; § 21-5507	15	16	Yes	No	“It shall be a defense to a prosecution for sexual intercourse with a minor if the person was married to the accused at the time of the offense.”

KY	K.R.S. § 510.035; § 510.040; § 510.050; § 510.060; § 510.110; § 510.120; § 510.130	17	16	Yes	Yes	“A person who engages in sexual intercourse with another person to whom the person is not lawfully married or subjects another person to whom the person is not lawfully married to sexual contact, does not commit an offense regardless of the person's age solely if the person is less than sixteen (16) years old or a person with an intellectual disability.”
LA	LA Stat. § 14:42; § 14:80; § 14:80.1	16	13	Yes	No	“Felony carnal knowledge of a juvenile. A person who is seventeen years of age or older but less than seventeen years of age and the victim is not the spouse of the offender and the difference between the age of the victim and the age of the offender is four years or greater...”
ME	M.R.S. Title 17-A, § 253; § 254; § 255-A; § 260	16	14	Yes	No	“A person is guilty of sexual abuse in the second degree if the person engages in a sexual act with another person who is not the actor's spouse, who is either 14 years of age or older and the actor is at least 5 years older than the victim.”
MD	MD Code Crim. Law § 3-304; § 3-307; § 3-308; § 3-318	18	14	Yes	Yes	“A person may not engage in vaginal intercourse with another... if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person knows or reasonably should know that the victim is a substantially cognitively impaired individual, an incapacitated individual, or a physically helpless individual, or if the victim is under the age of 16 years and the person performing the act is at least 4 years older than the victim.” “Except as provided in subsections (b) and (c), a person may not be prosecuted under this subtitle for a crime under § 3-308 of this subtitle for a crime if the person's legal spouse at the time the person committed the sexual offense.”
MA	M.G.L Title 265 § 23	17	16	No	No	N/A
MI	M.C.L. §750.520b; §750.520c; §750.520d; §750.520e; §750.520f	18	16	Yes	Yes	“ A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual intercourse with another person and if any of the following conditions exist: (i) The other person is at least 13 years of age....The actor knows or has reason to believe that the other person is mentally incapable, mentally incapacitated, or physically helpless....This subdivision does not apply if the person is lawfully married to each other at the time of the violation.”
MN	Minn. Stat. § 609.341; § 609.342; § 609.345	18	16	No	No	N/A
MS	Miss. Code § 97-3-65; § 97-3-95; § 97-3-99	0	16	Yes	No	“The crime of statutory rape is committed if a person who is at least seventeen (17) years of age or older engages in sexual intercourse with a child who: (i) Is at least fourteen (14) years of age; (ii) Is thirty-six (36) months or less than the age of the person; and (iii) Is not the person's legal spouse.”
MO	MO Rev. Stat. § 566.023; § 566.032; § 566.034; § 566.071	16	14	Yes	No	“A person commits the crime of statutory rape if he has sexual intercourse with another person who is less than fourteen years old.” “A person commits the offense of sexual intercourse in the second degree if being twenty-one years of age or older and the person engages in sexual intercourse with another person who is less than seventeen years of age.”

NC	NC Gen. Stat. § 14-27.7 A	16	16	Yes	No	“A defendant is guilty of a Class B offense if he or she engages in vaginal intercourse or a sexual act with a person who is 13, 14, or 15 years of age and is at least six years older than the person. The person is not lawfully married to the person.”
ND	N.D.C.C § 12.1-20-01; § 12.1-20-03; § 12.1-20-07	16	15	No	No	N/A
OH	Ohio Rev. Code § 2907.02; § 2907.04; § 2907.05; § 2907.06	17	13	Yes	Yes	“No person shall have sexual contact with the spouse of the offender; cause another person to have sexual contact with the offender, to have sexual contact with one or more other persons to have sexual contact with the offender; or engage in sexual contact with one or more other persons, or is reckless in that regard with respect to the other person's, or one of the other person's, or one of the other person's conduct is substantially imminently likely to cause the person to know that the other person, or one of the other persons, is at least sixteen years of age and four years older but less than sixteen years of age and the offender knows the age of such person is at least eighteen years of age and four years older than the other person... ”
OK	Okla. Stat. Title 21 § 1111v.2	0	14	Yes	Yes	“Rape is an act of sexual intercourse accomplished with a member of the opposite sex as the perpetrator under the following circumstances: 1. Where the victim is under the age of sixteen years; 2. Where the victim is incapable of giving legal consent because of any other unsoundness of mind, which is permanent, of giving legal consent.”
OR	Or. Rev. Stat. § 163.315; § 163.345; § 163.355; § 163.365; § 163.375; § 163.415; § 163.435	17	15	No	No	N/A
PA	Penn. Cons. Stat. Title 18 § 3121	18	13	No	No	N/A
RI	RI Gen. Laws § 11-37-2; § 11-37-6; § 11-37-8.1; § 11-37-8.3	18	14	No	No	N/A
SC	SC Code § 16-3-651; § 16-3-655; § 16-3-658	16	14	Yes	Yes	“A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual intercourse with another person if any one or more of the following conditions exist: The actor knows or has reason to know that the other person is mentally defective, mentally incapacitated, or physically helpless and aggravated force or age is used to accomplish sexual battery.” A person is guilty of criminal sexual conduct in the third degree if the actor is over four years of age and the actor willfully and lewdly commits a lewd or lascivious act upon or with a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child. However, a person is not guilty of a violation of the provisions of this section if the actor is at least eighteen years of age or less when the actor engages in consensual lewd or lascivious conduct with a child who is at least fourteen years of age.”

						“A person cannot be guilty of... Sections 16-3-651 through 16-3-653 unless the couple is 16 years of age or older, the spouse unless the couple is 16 years of age or older, the spouse's conduct constitutes a crime of the first degree or second degree as defined in 16-3-653.”
SD	SD Cod. L § 22-22-1; § 22-22-7; § 22-22-7.3	16	10	Yes	Yes	“Any person, sixteen years of age or older, who engages in sexual contact with another person's spouse if the other person is at least 16 years of age is guilty of a Class 3 felony.” “No person fifteen years of age or older who is in sexual contact with another person's spouse who, although capable of sexual contact, is not to such contact...”
TN	Tenn. Code § 39-13-501; § 39-13-506; § 39-13-522	17	13	No	No	N/A
TX	Tex. Penal Code § 22.011; § 22.021	16	14	Yes	No	“A person, regardless of whether the person is at the time of the offense, the actor, (A) causes the penetration of the victim by any means; (B) causes the penetration of the victim by the sexual organ of the actor or the sexual organ of the actor to contact or penetrate the victim, including the victim's mouth, anus, or sexual organ, including the actor; or (C) causes the actor to contact the mouth, anus, or sexual organ of the victim, including the actor; or (D) causes the actor to contact the anus or sexual organ of the actor...” It is an affirmative defense to a charge of sexual assault (a)(2): (1) that the actor was not the victim of the offense...”
UT	Utah Code § 76-5-401; § 76-5-401.2; § 76-5-402.1; § 76-5-407	16	16	Yes	No	“The provisions of this part apply to sexual contact between individuals married to each other.”
VT	V.S Title 13 § 3252; § 3253	18	16	Yes	No	“No person shall engage in a sexual act with another person under the age of 16, except: (a) if the person is married to each other and the sexual act is consensual.”
VA	Va. Code § 18.2-61; § 18.2-63; § 18.2-371	18	15	Yes	No	“Any person 18 years of age or older who, with any child, who (i) willfully causes the child to engage in any act, omission, or condition that is in the child's best interest, in need of services, in need of protection, or in need of care, or (ii) is neglected as defined in § 16-1-2, to engage in sexual intercourse or anal intercourse, cunnilingus, fellatio, or anilingus, or (iii) is not his spouse, child, or grandchild, is guilty of a misdemeanor.”
WA	Wash. Rev. Code § 9A.44.073; § 9A.44.076; § 9A.44.079; § 9A.44.083; § 9A.44.086; § 9A.44.089	18	16	Yes	No	“A person is guilty of rape of a child if the person has sexual intercourse with a child twelve years old but less than 16 years of age, to the perpetrator and the perpetrator is at least 16 years older than the victim.”
WV	W. Va. Code. § 61-8B-3; § 61-8B-5; § 61-8B-7; § 61-8B-9	16	16	No	No	N/A
WI	Wis. Stat. § 948.01; § 948.02; § 948.09; § 948.093	16	18	Yes	No	“Whoever has sexual intercourse with another person's spouse and who is guilty of a Class A misdemeanor is guilty of a Class A misdemeanor if the person is under the age of 19 years when the act is committed.”

						“Whoever has sexual contact with a person under the age of 15 years but has not attained the age of 15 years, is guilty of a Class C misdemeanor if the actor has not attained the age of 19 years at the time the offense occurs. This section does not apply to a spouse.”
WY	Wyo. Stat. § 6-2-314; § 6-2-315; § 6-2-316; § 6-2-317	16	18	No	No	N/A

E: Forced Marriage Criminal Laws

State	Citation(s)	Relevant Text
CA	C.P.C § 265	“Every person who takes any woman unlawfully, against her will, and by force, menace or duress, to marry him, or to marry any other person, or to be defiled, is punishable by imprisonment in the State Penitentiary not less than ten (10) years.”
FL	FL Stat. § 787.06	“Any person who knowingly, or in reckless disregard of the facts, engages in human trafficking, or benefits financially by receiving anything of value from that has subjected a person to human trafficking... ‘Human trafficking’ means transporting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of prostitution, or for the purpose of sexual exploitation of another person. ‘Services’ means any act committed at the behest of, under the supervision of, or for the benefit of another. The term includes, but is not limited to, forced marriage, servitude, or the removal of an organ from a person.”
IN	Ind. Code § 35-42-3.5-1	“A person who, by force, threat of force, or fraud, knowingly or intentionally recruits, harbors, transports, or obtains another person:(1) to engage the other person in:(A) forced labor; or(B) involuntary servitude; or(C) to engage the other person into:(A) marriage;(B) prostitution; or(C) participating in sexual conduct constituting a crime under this Code, is guilty of human trafficking, a Level 4 felony.”
MD	MD Crim. Law Code § 11-303	“A person may not knowingly take or detain another with the intent to use force, threat, or duress to compel the other to marry the person or a third person or perform a sexual act, sexual conduct, or sexual intercourse.”
MA	M.G.L Title 272 § 1	“Whoever fraudulently and deceitfully entices or takes away an unmarried person under the age of sixteen years from such person’s parents or elsewhere, without the consent of the parent or guardian, if any, and such person is living, for the purpose of effecting a clandestine marriage of such person, without the consent of such parent or guardian, shall be punished by imprisonment for not more than one year, or by a fine not more than one thousand dollars, or both.”
MN	Minn. Stat. § 609.265	“Whoever, for the purpose of marriage, takes a person under the age of 18 years, without the consent of the person’s parents, guardian, or other person having legal custody of such person is guilty of abduction. A person guilty of this crime is sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$1,000, or both.”
MS	Miss. Code § 97-3-1	“Every person who shall take any person over the age of fourteen (14) years unlawfully, against her will, and by force, menace, fraud, deceit, stratagem or duress, compel or induce him or her to marry any other person, or to be defiled, and shall be thereof duly convicted, shall be punished by imprisonment in the penitentiary not less than five (5) years and not more than fifteen (15) years.”
NV	Nev. Rev. Stat. §201.300	“A person is guilty of sex trafficking if the person takes or detains a person with the intent to engage the person in prostitution by force, violence, threats or duress to marry him or her or any other person.”
OK	Okla. Stat. Title 21, § 1117; § 1118; § 1119	“Compelling woman to marry: Any person who takes any woman against her will, and by force, violence, threats or duress, compels her to marry him or to marry any other person, shall be guilty of a felony and shall be punished by imprisonment in the State Penitentiary not less than ten (10) years.” “Intent to compel woman to marry: Any person who takes any woman unlawfully against her will, and by force, menace or duress to marry him, or to marry any other person, shall be punishable by imprisonment in the State Penitentiary not exceeding (10) years. §1119, A person who takes away or induces to leave any person under the age of fifteen: Every person who takes away or induces to leave any person under the age of fifteen, without the consent of the person’s parent, guardian, or other person having legal charge of the person, without the consent of such parent, guardian, or other person having legal charge, for the purpose of marriage . . . shall be guilty of a felony and shall be punishable by imprisonment in the State Penitentiary not exceeding five (5) years, or by imprisonment in the county jail not exceeding one (1) year, or by a fine not exceeding One Thousand Dollars, or both, or such fine and imprisonment.”
VA	VA Code § 18.2-355	“Any person who takes or detains a person against his or her will with the intent to compel the person to marry or to be defiled by threats, persuasions, menace or duress, to marry him or her or to marry any other person, shall be guilty of pandering.”
WV	WV Code § 61-2-14	“Any person who takes away another person, or detains another person against such person’s will, to marry or defile the person, or to cause the person to be married or defiled by another person, or to cause the person to be married or defiled by another person under the age of sixteen years from any person having lawful charge of such child, for the purpose of prostitution, or concubinage, shall be guilty of a felony, and, upon conviction thereof, shall be confined to the State Penitentiary for not less than three nor more than ten years.”

F: Marital Restrictions Based on Mental Disability

State	Citation(s)	Prevention of Marriage for Mental Disability?	Annulment of Marriage for Mental Disability?	Relevant Text
AL	AL Code Tit. 30; The Harris Firm, ‘Annulment in Alabama’ (http://theharrisfirmllc.com/annulment-lawyer-in-alabama/)	No	Unclear	No specific statutory law. Secondary sources indicate mental disability is considered as a factor in annulment
AK	AK Stat. § 25.05.111; § 25.24.030	Unclear	Yes	“If all requirements have been met, and there is no legal objection to the contemplated marriage, and neither party is under the influence of alcohol or otherwise incapable of understanding the seriousness of the marriage, the licensing officer shall issue a license.” “A marriage may be declared void for any of the following reasons: either party was of unsound mind, unless the party was of unsound mind at the time of the marriage; either party was previously married; or the parties freely cohabited with the other as husband and wife.”
AZ	A.R.S § 25-301	No	Unclear	“Superior courts may dissolve a marriage and may adjudge a marriage void when the cause alleged constitutes an impediment rendering the marriage void.”
AR	AR Code § 9-12-201	No	Yes	“When either of the parties to a marriage is incapable from mental incapacity of understanding of consenting to any marriage or is incapable of performing the marriage state due to physical causes...the marriage shall be void. A nullity shall be declared by a court of competent jurisdiction.”
CA	Cal. Fam. Code § 2210	No	Yes	“A marriage is voidable and may be adjudged a nullity if any of the following conditions existed at the time of the marriage: Either party was at the time of the marriage of unsound mind, after coming to reason, from the time of the marriage, unless the party of unsound mind, after coming to reason, from the time of the marriage, was otherwise as his or her spouse.”
CO	C.R.S § 14-10-111	No	Yes	“The district court shall enter its decree declaring the invalidity of a marriage into under the following circumstances: A party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol or other incapacitating substances.”
CT	C.G.S § 46b-29	Limited	Unclear	“No marriage license may be issued to any applicant under the age of 18 without the consent of a conservator” “A marriage is voidable when there is a lack of mutual consent at the time of the marriage.”
DE	D. Code Title 13 §110; § 1506(a)(5)	No	Yes	“The Court shall enter a decree of annulment of a marriage if the following circumstances: A party lacked capacity to consent to the marriage was solemnized, either because of mental incapacity or because of the influence of alcohol, drugs or other incapacitating substances.”
FL	‘Annulment’ (Florida Courts) < https://www.flcourts.gov/content/download/862646/file/Everything%20Else%20-%20ANNULMENT.pdf > accessed 10 March 2025	No	Yes	No statutory provision. Secondary sources indicate mental disability is a factor in annulment.
GA	GA Code § 19-3-2; § 19-5-3(4)	Yes	Yes	“To be able to contract marriage, a person must be of sound mind.” “The following grounds shall be sufficient to authorize the grant of annulment: Mental incapacity at the time of the marriage; incurable mental disease; or the influence of alcohol, drugs or other incapacitating substances.”
HI	Haw. Rev. Stat. § 572-1; § 580-21(5)	No	Yes	“Prohibits the marriage of a party with loathsome disease contracted before the marriage, unknown to, the other party, but likely will not apply to mental disability.” “The family court, by a decree of nullity, may declare void a marriage if any of the following causes, existing at the time of the marriage: either party lacked the mental capacity to consent to the marriage.”

ID	I.C.A.S § 32-501(5)	No	Yes	“A marriage may be annulled for any of the following grounds: That either party was of unsound mind at the time of the marriage; That either party was of unsound mind to reason, freely cohabited with the other as husband and wife; That either party was of unsound mind to reason, freely cohabited with the other as husband and wife; That either party was of unsound mind to reason, freely cohabited with the other as husband and wife.”
IL	I.L.C.S § 5/301(1)	No	Yes	“The court shall enter its judgment declaring the invalidity of the marriage (known as annulment) entered into under the following circumstances: A party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of fraud.”
IN	Ind. Code § 31-11-10-1	Yes	Yes	“A clerk of a circuit court may not issue a marriage license to a person who applies for the license: has been adjudged to be incompetent; or the clerk finds that the adjudication is no longer in effect.” “A marriage is voidable if a party to the marriage was at the time of contracting the marriage mentally incompetent.”
IA	Iowa Code § 598.29; § 589.3	Limited	Yes	“The license must not be granted in any case where a person is under a guardianship and the court has made a finding that the person is not competent to contract a valid marriage.” “Marriage may be annulled for the following causes: 1. A party to the marriage was at the time of contracting the marriage mentally incompetent; 2. A party to the marriage was at the time of contracting the marriage under a guardianship and was found by the court to be incompetent to contract a valid marriage.”
KS	Kan. Stat. § 23-2702	No	Unclear	“The district court shall grant a decree of annulment of a marriage on the following grounds: the marriage is void for any reason; the marriage is voidable; or the marriage is prohibited by law.”
KY	K.R.S § 402.020; § 403.120 (1)(a)	Yes	Yes	“Marriage is prohibited and void with a person who is legally incompetent or disabled by a court of competent jurisdiction.” “The Circuit Court shall enter its decree declaring the invalidity of the marriage entered into under the following circumstances: A party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or deformity.”
LA	LA Title IV Chapter 2 Art 95	No	Unclear	“A marriage is relatively null when the consent of one of the parties is not freely given. Such a marriage may be declared null and void by the court whose consent was not free. The marriage may not be confirmed by the court after recovering his liberty or after the death of the other party.”
ME	M.R.S. Title 19-A, §752	No	No	N/A
MD	M.F.L.C § 2-301; § 2-406; <i>Morris v Morris</i> (1940) 13 Atl 2d 603 (Delaware)	No	No	N/A
MA	M.G.L Title 207 § 16	No	Yes	“The issue of a marriage declared void by reason of mental incapacity of either party shall be the legitimate issue of the parents of the child born of the marriage.”
MI	M.C.L §552.37; §552.39	No	No	N/A
MN	Minn. Stat § 517.03; § 518.02	Limited	Yes	“Developmentally disabled persons committed to the care of the commissioner of human services and developmentally disabled persons under the conservatorship of the commissioner of human services may not marry. The conservatorship limit the right to marry, may marry only with the approval of the commissioner. The commissioner shall grant consent to marry if, after the commissioner's investigation that the civil marriage is in the best interest of the ward or conservatee and the public.” “A marriage shall be declared a nullity under the following circumstances: A party lacked capacity to consent to the marriage at the time the marriage was solemnized either because of mental incapacity or infirmity or because of fraud; or the marriage was solemnized did not know of the incapacity of the other party.”
MS	Miss. Code § 93-1-5; § 93-7-3	Yes	Yes	“In no event shall a license be issued by the circuit court clerk to a person who is of unsound mind or who is afflicted with a mental illness or an intellectual disability to the extent that the person is incapable of understanding the nature and consequences of the marriage.”

				does not understand the nature and consequences of the application for a license.”
				“A marriage may be annulled for any one (1) of the following reasons at the time of the marriage ceremony: Adjudicated mental illness of either party or both parties.”
MO	MO Rev. Stat.§ 451.020; <i>Forbis v Forbis</i> (1955) 274 SW2d 800 (Springfield Court of Appeals)	Limited	Yes	“It shall be presumed that marriages between persons who lack capacity to enter a marriage contract are prohibited unless the court having jurisdiction finds that a person approves the marriage.” Case law indicates that mental incapacity at the time of marriage is grounds for divorce
MT	Mont. Code § 40-1-402	No	Yes	“The district court shall enter its decree declaring the invalidity of a marriage entered into under the following circumstances: a party lacked capacity to enter into a marriage at the time that the marriage was entered into, either because of mental incapacity or infirmity or because of the influence of alcohol or other incapacitating substances.”
NE	Neb. Rev. Stat. § 42-103; § 42-107	Unclear	Yes	“If the required proof is not given, if it shall appear that either party was incompetent to enter into such contract or that there is any impediment by law...the county clerk shall refuse to grant a license.” “Marriages are void when either party, at the time of marriage, was incompetent to enter into the marriage relation.”
NV	Nev. Rev. Stat. § 122A.100	Unclear	No	“To be eligible to register pursuant to subsection 1, two persons wishing to form a domestic partnership must furnish proof satisfactory to the clerk of the State that: Both persons are competent to consent to the domestic partnership of State that: Both persons are competent to consent to the domestic partnership”
NH	NH Rev. Stat. § 458:12	No	Limited	“Although the insanity of the petitioner may be considered in determining whether a divorce should be granted, such insanity is no defense to a petition for divorce.”
NJ	NJ Rev. Stat. § 37:1-9; 2A:34-1	Yes	Yes	“No marriage license shall be issued when, at the time of marriage, either therfor, either applicant is a person currently adjudicated incompetent.” “Judgments of nullity of marriage may be rendered in all cases where either of them, lacked capacity to marry due to want of understanding, mental condition, or the influence of intoxicants, drugs, or substances.”
NM	N/A	No	No	N/A
NY	NY Dom. Rel. Code §7	No	Yes	“A marriage is void from the time its nullity is declared by a court of this jurisdiction if either party thereto: Has been incurably mentally ill for five years or more.”
NC	NC Gen. Stat. § 51-3	No	Unclear	“All marriages between any two persons between persons either of whom at the time incapable of contracting from want of will or understanding”
ND	N.D.C.C § 14-03-18; § 14-04-01	No	Yes	“A marriage may be annulled by an action in the district court for nullity for any of the following causes existing at the time of marriage: a party was of unsound mind, unless such party, after coming to full use of his or her mind, cohabited with the other as husband or wife.”
OH	Ohio Rev. Code § 3101.06; § 3105.31	No	Yes	“A marriage may be annulled for any of the following causes existing at the time of the marriage: That either party has been adjudicated to be mentally incompetent unless such party after being restored to competency cohabited with the husband or wife.”
OK	Okla. Stat. Title 43 § 101	Unclear	Unclear	“Marriage is a personal relation arising out of a civil contract between two parties legally competent of contracting and of entering into it.”
OR	Or. Rev. Stat. § 107.015	No	Yes	“A judgment for the annulment or dissolution of a marriage may be rendered against either party to the marriage was incapable of making the marriage contract or consenting to the marriage for want of legal age or sufficient understanding”
PA	Penn. Con. Stat. Title 23 § 1304; § 3305(a)(5)	Yes	Yes	“No marriage license may be issued if either of the applicants is mentally minded, insane, of unsound mind or is under guardianship of the person”

				mind unless the court decides that it is for the best in the general public to issue the license and authorizes the court to do so. Statutory voidability for capacity is limited to intoxication restrictions in § 1304
RI	RI Gen. Laws § 15-1-5; § 15-3.1-2	Yes	Yes	“Persons shall be eligible to enter into a civil union only if neither person is mentally incompetent at the time of the union.” “Any marriage where either of the parties is mentally incompetent, shall be absolutely void.”
SC	SC Code. § 20-1-10; § 20-1-530	Yes	Limited	“All persons, except mentally incompetent persons as prohibited by this section, may lawfully contract marriage.” “If any such contract has not been consummated by the time thereto the court may declare such contract void for want of contracting parties or for any other cause going to show that the contract was made, it was not a contract.”
SD	SD Cod. L § 25-3-2	No	Yes	“A marriage may be annulled by an action in the circuit court of the county in which the marriage was solemnized, nullity if either party was of unsound mind at the time of the marriage, or if either party, after coming to reason, freely cohabitated with the other party.”
TN	Tenn. Code § 36-3-109	Yes	Yes	“No license shall be issued when it appears that the applicant at the time drunk, insane or an imbecile.” Mental illness is not listed statutory voidability for capacity on restrictions in § 36-3-109
TX	Tex. Fam. Code § 6.108	No	Yes	“The court may grant an annulment of a marriage to the extent of the marriage the other party did not have the capacity to understand the nature of the marriage or to understand the nature of the marriage at the time of the marriage or to understand the nature of the marriage disease or defect...”
UT	Utah Code § 30-1-17.1	No	Unclear	“A marriage may be annulled for any of the following reasons: the marriage: upon grounds existing at common law.”
VT	V.S Title 15 § 512	Yes	Yes	“The following persons are not authorized to marry, knowingly issue a civil marriage license, when: party is under the age of 18, or the nature of the conduct at issue.” “The civil marriage contract may be annulled when, either party...was physically or mentally incapable of entering into a civil marriage contract.”
VA	VA Code § 20-45.1	No	Yes	“All marriages solemnized when either of the parties was under the age of 18, or was infirmity, shall be void from the time they shall be solemnized, or nullity.”
WA	Wash. Rev. Code § 26.04.130	No	Yes	“When either party to a marriage shall be incapable of understanding the legal age or a sufficient understanding...such marriage shall be void.”
WV	N/A	No	No	N/A
WI	Wis. Stat. § 765.11; § 767.313(1)(a)	Limited	Yes	“If any parent, grandparent, child, or natural guardian of a minor, or any brother, sister, or guardian of a minor, or any person who has been granted a marriage license, either of the applicants, the district court judge, or the county clerk believes... that an applicant is adjudicated incompetent, or that the applicant has no right to marry, that person may file with the court having jurisdiction in the county in which the marriage license is applied for, a petition for annulment, stating the grounds of objection to the marriage, and asking the court to annul the marriage, and making the application to show cause why the marriage should not be annulled.” “A court may annul a marriage upon any of the following grounds: the party was incapable of capacity to consent to the marriage at the time the marriage was solemnized, or because of age, because of mental disability...”

WY	WY Stat. § 20-2-101	No	Yes	“Marriages contracted in Wyoming are void without any defense if either party is mentally incompetent at the time of contracting.”
----	---------------------	----	-----	--

G: Annulment Based on Force and Fraud

State	Citation(s)	Void for force?	Void for fraud?	Relevant Text
AL	AL Code Tit. 30; The Harris Firm, 'Annulment in Alabama' (http://theharrisfirmllc.com/annulment-lawyer-in-alabama/)	Yes	Yes	No statutory provision. Secondary sources indicate for annulment
AK	AK Stat. § 25.24.030	Yes	Yes	"A marriage may be declared void for any of the following reasons at the time of the marriage: that the consent of either party was obtained by force, unless that party afterwards, with full knowledge of the facts, freely cohabited with the other as husband and wife; that the consent of either party was obtained by fraud, unless that party afterwards, with full knowledge of the facts, freely cohabited with the other as husband and wife..."
AZ	A.R.S § 25-301	Unclear	Unclear	"Superior courts may dissolve a marriage and may declare it null and void when the cause alleged constitutes an impediment to a valid marriage void."
AR	AR Code § 9-12-201	Yes	Yes	"When the consent of either party shall have been obtained by force, the marriage shall be void from the time its nullity is declared by the court of competent jurisdiction."
CA	Cal. Fam. Code § 2210	Yes	Yes	"A marriage is voidable and may be adjudged a nullity if the following conditions existed at the time of the marriage: the consent of either party was obtained by force, unless the party whose consent was so obtained afterwards freely cohabited with the other as his or her spouse; or either party was obtained by fraud, unless the party whose consent was so obtained by fraud afterwards, with full knowledge of the facts, freely cohabited with the other as his or her spouse."
CO	C.R.S § 14-10-111	Yes	Yes	"The district court shall enter its decree declaring the marriage null and void entered into under the following circumstances: One or both parties to the marriage under duress exercised by the other party, or not such other party knew of such exercise of duress at the time he or she entered into the marriage in reliance upon a fraudulent act or representation of the other party, which fraudulent act or representation goes to the essence of the marriage."
CT	C.G.S. § 46b-40; 'Qualifying for a Civil Annulment in Connecticut' (Connecticut Judicial Branch) < https://jud.ct.gov/lawlib/palm_cards/Civil_Annulment.pdf > accessed 10 March 2025	Unclear	Unclear	"A marriage is voidable when there is a lack of mutual consent." Secondary sources do not indicate force included as
DE	D. Code Title 13 § 1506(a)(5)	Yes	Yes	"The Court shall enter a decree of annulment of a marriage if the following circumstances exist: any of the following circumstances: One or both parties to the marriage under duress exercised by the other party, or not such other party knew of such exercise of duress at the time he or she entered into the marriage in reliance upon a fraudulent act or representation of the other party, which fraudulent act or representation goes to the essence of the marriage."
FL	'Annulment' (Florida Courts) < https://www.flcourts.gov/content/download/862646/file/Everything%20Else%20-	Yes	Yes	No statutory provision. Secondary sources indicate for annulment

	%20ANNULMENT.pdf> accessed 10 March 2025			
GA	GA Code § 19-5-3(4)	Yes	Yes	“The following grounds shall be sufficient to authorize the divorce: Force, menace, duress, in obtaining the marriage; marriage”
HI	Haw. Rev. Stat. § 580-21(5)	Yes	Yes	“The family court, by a decree of nullity, may declare void contract for any of the following causes, existing at the time that consent to the marriage of the party applying for annulment by force, duress, or fraud, and there has been no subsequent
ID	I.C.A.S § 32-501(5)	Yes	Yes	“A marriage may be annulled for any of the following causes at the time of the marriage: That the consent of either party was obtained by force or duress, or fraud, unless such party afterwards freely cohabited with the other as husband or wife... That the consent of either party was obtained by fraud, and thereafter, with full knowledge of the facts constituting the fraud, the party cohabited with the other as husband or wife.”
IL	I.L.C.S § 5/301(1)	Yes	Yes	“The court shall enter its judgment declaring the invalidity of a marriage (formerly known as annulment) entered into under the following circumstances: a party was induced to enter into a marriage by force or duress, or by fraud involving the essentials of marriage.”
IN	Ind. Code § 31-11-9-2; § 31-11-9-3	No	Yes	“A marriage is voidable if the marriage was brought about by the fraud of one (1) of the parties to the marriage.”
IA	Iowa Code § 598.29	No	No	N/A
KS	Kan. Stat. § 23-2702	Unclear	Yes	“The district court shall grant a decree of annulment of any marriage on any one of the following grounds: the marriage is void for any reason; the marriage is voidable because it was induced by fraud.”
KY	K.R.S § 403.120(1)(a)	Yes	Yes	“The Circuit Court shall enter its decree declaring the invalidity of a marriage entered into under the following circumstances: a party was induced to enter into a marriage by force or duress, or by fraud involving the essentials of marriage.”
LA	LA Title IV Chapter 2 Art 95	Unclear	Unclear	“A marriage is relatively null when the consent of one of the parties was not freely given. Such a marriage may be declared null upon the application of a party whose consent was not free. The marriage may not be annulled if the party confirmed the marriage after recovering his liberty or after attaining the age of discernment.”
ME	M.R.S Title 19-A, §752; ‘Maine Annulment’ (Maine Divorce Group 2025) < https://www.themainedivorcegroup.com/divorce/maine-annulment-prohibited-marriages-attorneys/ >	No	Yes	Secondary sources indicate fraud as grounds for annulment
MD	M.F.L.C § 2-301; § 2-406; <i>Morris v Goodwin</i> (2016) 230 Md App 395 (Maryland Appellate Court)	Yes	Yes	“A voidable marriage is valid until a court declares it to be void. A victimized party may challenge the validity of the marriage if it was voidable if at the time of the ceremony...consent was procured by force or fraud.”
MA	‘Find out If You’re Eligible to Get an Annulment’ (Commonwealth of Massachusetts) < https://www.mass.gov/info-details/find-out-if-youre-eligible-to-get-an-annulment > accessed 10 March 2025	No	Yes	Secondary sources indicate fraud as grounds for annulment
MI	M.C.L. § 552.37	Yes	Yes	“No marriage shall be annulled on the ground of force or fraud, unless the party seeking annulment proves that, at any time before the commencement of the suit, there was no cohabitation of the parties as husband and wife.”

MN	Minn. Stat. § 518.02	Yes	Yes	“A marriage shall be declared a nullity under the for because consent of either was obtained by force or f subsequent voluntary cohabitation of the parties.”
MS	Miss. Code § 93-7-3(d)	Yes	Yes	“A marriage may be annulled for any one of the foll time of the marriage ceremony: where the consent o obtained by force or fraud, the marriage shall be voi declared by a court of competent jurisdiction.”
MO	Wortman M, ‘What Qualifies for an Annulment in Missouri?’, (2022) < https://www.mwortmanlaw.com/2022/12/what-qualifies-for-an-annulment-in-missouri/ >	Yes	Yes	Secondary sources indicate force and fraud as grou
MT	Mon. Code § 40-1-402	Yes	Yes	“A marriage will be invalid if one spouse is induced duress, or if there is fraud by one spouse regarding t contract. You must bring this case no more than 2 y condition.”
NE	Neb. Rev. Stat. § 42-118	Yes	Yes	“In case the consent of one of the parties was obtain there shall have been no subsequently voluntary coh marriage shall be deemed voidable.
NV	Nev. Rev. Stat. § 125.340	No	Yes	“If the consent of either party was obtained by frau the marriage shall be void from the time its nullity s of competent authority. No marriage may be annulle the marriage voluntarily cohabit as a married couple of such fraud.”
NH	NH Rev. Stat. § 458-1-3; ‘NH Family Law Research Guide: Divorce’ (University of New Hampshire Pierce School of Law) < https://law.unh.libguides.com/nhfamilylaw/divorce > accessed 10 March 2025	No	Yes	Secondary sources indicate fraud as grounds for ann
NJ	NJ Rev. Stat. § 2A:34-1	Yes	Yes	“Judgments of nullity of marriage may be rendered a lack of mutual assent to the marital relationship; d essentials of marriage; and has not subsequently rat
NM		No	No	N/A
NY	NY Dom. Rel. Code §7(4)	Yes	Yes	“A marriage is void from the time its nullity is decla jurisdiction if either party thereto: consent to such m duress or fraud.”
NC		No	No	N/A
ND	N.D.C.C. § 14-04-01	Yes	Yes	“A marriage may be annulled by an action in the dis of nullity for any of the following causes existing at That the consent of either party was obtained by for afterwards freely cohabited with the other as husband consent of either party was obtained by fraud, unles with full knowledge of the facts constituting the fra other as husband or wife.”
OH	Ohio Rev. Code § 3105.31	Yes	Yes	“A marriage may be annulled for any of the followi time of the marriage: That the consent to the marria obtained by force, unless such party afterwards coh husband or wife.... That the consent of either party unless such party afterwards, with full knowledge o fraud, cohabited with the other as husband or wife”
OK		No	No	N/A
OR	Or. Rev. Stat. § 107.015(1)(b)	Yes	Yes	“Except as provided in subsection (2) of this section annulment or dissolution of a marriage may be rend either party was obtained by force or fraud...”

PA	Penn. Con. Stat. Title 23 § 3305(a)	Yes	Yes	“The marriage of a person shall be deemed voidable and subject to annulment in the following cases: Where one party was induced to enter into a marriage by fraud, duress, coercion or force attributable to the other party and there has been no subsequent voluntary cohabitation after knowledge of the facts constituting the release from the effects of fraud, duress, coercion or force.”
RI		No	No	N/A
SC	SC Code § 20-1-530; ‘Marriage and Annulment’ (Crossroads Family Law and Mediation South Carolina) < http://crossroadsfamilylaw.com/south-carolina-legal-services-divorce-video/ > accessed 10 March 2025	Yes	Yes	“If any such contract has not been consummated by the contracting parties thereto the court may declare such contract void for fraud, duress, coercion or force either of the contracting parties or for any other cause going to the validity of the contract at the time the supposed contract was made, it was not a contract.” Secondary sources indicate force and fraud as grounds for annulment.
SD	SD Cod. L § 25-3-5; § 25-3-6	Yes	Yes	“A marriage may be annulled by an action in the circuit court of the county in which the marriage was solemnized if, at the time of the marriage, the consent of either party was obtained by force, unless such party afterwards freely cohabitated with the husband or wife. An action to obtain a decree of nullity of a marriage as mentioned in this section must be commenced by the injured party within four years after the marriage.... A marriage may be annulled by an action in the circuit court to obtain a decree of nullity if, at the time of the marriage, the consent of either party was obtained by fraud, unless such party afterwards freely cohabited with the other as husband or wife. An action to obtain a decree of nullity for causes mentioned in this section must be commenced by the injured party within four years after the discovery of the facts constituting the fraud or duress.”
TN	<i>Coulter v Hendricks</i> (1995) 918 SW2d 424 (Tennessee Court of Appeals); Goldstein A, ‘Am I Eligible for an Annulment in Tennessee?’ (Cole Law 2022) < https://www.colelawgrouppc.com/blog/am-i-eligible-for-an-annulment-in-tennessee/#_edn2 >	Yes	Yes	Secondary sources indicate force and fraud as grounds for annulment.
TX	Tex. Fam. Code § 6.107	Yes	Yes	“The court may grant an annulment of a marriage to a party if (1) the other party used fraud, duress, or force to induce the party to enter into the marriage; and (2) the petitioner has not voluntarily cohabited with the other party since learning of the fraud or since being released from the effects of duress or force.”
UT		No	No	N/A
VT	V.S Title 15 § 512	Yes	Yes	“The civil marriage contract may be annulled when, at the time of the marriage, the consent of either party was obtained by force or fraud.”
VA	VA Code § 20-89.1	Yes	Yes	“When a marriage is alleged to be void or voidable...by violence, fraud, duress, either party may institute a suit for annulling the same. If the court finds of the nullity of the marriage, it shall be decreed void by a judgment of annulment...”
WA	Wash. Rev. Code § 26.04.130	Yes	Yes	“When either party to a marriage shall be incapable of contracting because of want of legal age or a sufficient understanding, or when the consent of either party shall be obtained by force or fraud, such marriage is voidable. The suit of the party laboring under the disability, or upon whom the fraud is imposed.”
WV	WV Code § 48-3-105	Yes	Yes	“An action for annulling a marriage may not be instituted without proof of fraud, force or coercion, by the party who was guilty of such fraud, force or coercion, nor by the injured party if, after knowledge of the facts constituting the fraud, force or coercion, the party by acts or conduct confirmed such marriage.”
WI	Wis. Stat. § 767.313	Yes	Yes	“A court may annul a marriage upon any of the following grounds: (1) the marriage was induced to enter into a marriage by force or duress, or by fraud, or (2) the marriage was not an essential of marriage. Suit may be brought by either party.”

				representative of a party lacking the capacity to con after the petitioner obtained knowledge of the descr
WY	WY Stat. § 20-2-101	Yes	Yes	“Marriages contracted in Wyoming are void without if the consent of one (1) of the parties was obtained was no subsequent voluntary cohabitation of the par

ANNEX: ATTORNEY GENERAL OUTREACH

State	Attorney General	Response Received?	Response result
AL	Steve Marshall	No	N/A
AK	Kevin Clarkson	Yes	No available data
AZ	Mark Brnovich	Yes	No available data
AR	Leslie Rutledge	No	N/A
CA	Xavier Becerra	No	N/A
CO	Phil Weiser	No	N/A
CT	William Tong	No	N/A
DE	Kathy Jennings	No	N/A
FL	Ashley Moody	Yes	No available data
GA	Chris Carr	No	N/A
HI	Clare Connors	Yes	No available data
ID	Lawrence Wasden	No	N/A
IL	Kwame Raoul	No	N/A
IN	Curtis Hill	No	N/A
IA	Tom Miller	No	N/A
KS	Derek Schmidt	No	N/A
KY	Daniel Cameron	Yes	Refused to provide information to non-resident
LA	Jeff Landry	No	N/A
ME	Aaron Frey	Yes	No available data
MD	Brian Frosh	No	N/A
MA	Maura Healey	Yes	No available data
MI	Dana Nessel	No	N/A
MN	Keith Ellison	No	N/A
MS	Lynn Fitch	Yes	No available data
MO	Eric Schmitt	No	N/A
MT	Tim Fox	No	N/A
NE	Doug Peterson	Yes	No available data
NV	Aaron Ford	No	N/A
NH	Gordon MacDonald	No	N/A
NJ	Gurbir Grewal	No	N/A
NM	Hector Balderas	No	N/A
NY	Letitia James	No	N/A
NC	Josh Stein	No	N/A
ND	Drew Wrigley	Yes	AG does not have jurisdiction over FM cases (if they exist)
OH	Dave Yost	No	N/A
OK	Mike Hunter	No	N/A
OR	Ellen Rosenblum	No	N/A
PA	David Sunday	No	N/A
RI	Peter Neronha	Yes	No available data
SC	Alan Wilson	Yes	No available data
SD	Jason Ravensborg	No	N/A
TN	Herbert Slatery	No	N/A
TX	Ken Paxton	Yes	No available data
UT	Sean Reyes	Yes	No available data
VT	T.J. Donovan	No	N/A
VA	Mark Herring	No	N/A
WA	Bob Ferguson	No	N/A
WV	Patrick Morrissey	No	N/A

WI	Josh Kaul	Yes	No available data
WY	Bridget Hill	No	No available data, but Victim Services has “heard of cases anecdotally”

BIBLIOGRAPHY

- Abrams K, 'Marriage Fraud' (2012) 100 California Law Review 1
- Abu Amara N, Guine A and Hamel C, 'Different Forms of Coercion Used to Obtain Consent: Defining Forced Marriage' (2013) 90 Societes Contemporaines 81
- Alanen J, 'Shattering the Silence Surrounding Forced and Early Marriage in the United States' (2012) 32 Children's Legal Rights Journal 2
- Alanen J, 'Custom or Crime?: Part I of IV: Catalysts and Consequences of Forced Marriage' (2016) 29 American Journal of Family Law 227
- Alexander L, 'The Moral Magic of Consent (II)' (1996) 2 Legal Theory 165
- Allain J, 'When Forced Marriage Is Slavery', *The Law and Slavery* (Brill Nijhoff 2015)
- Allen D, 'Marriage and Divorce: A Comment' (1992) 82 American Economic Review 679
- American Law Institute, *Principles of the Law of Family Dissolution* (1993)
- Andara K, Neal A and Khattar R, 'Disabled Workers Saw Record Employment Gains in 2023, But Gaps Remain' *Center for American Progress* (22 February 2024)
- Anderson M, 'Reviving Resistance in Rape Law' [1998] University of Illinois Law Review 953
- Anitha S and Gill A, 'Coercion, Consent and the Forced Marriage Debate in the UK' (2009) 17 Feminist Legal Studies 165
- Anitha S and Gill A, 'Reconceptualising Consent and Coercion within an Intersectional Understanding of Forced Marriage', *Forced Marriage: Introducing a Social Justice and Human Rights Perspective* (Zed Books 2011)
- Anitha S and Gill A, 'The Social Construction of Forced Marriage and Its "Victim" in Media Coverage and Crime Policy Discourse', *Forced Marriage: Introducing a Social Justice and Human Rights Perspective* (Zed Books 2011)
- Anitha S and Gill A, 'A Moral Panic? The Problematisation of Forced Marriage in British Newspapers' (2015) 21 Violence Against Women 1123
- Anti-Defamation League, 'A Brief History of the Disability Rights Movement' (2018)
- Areen J, 'Uncovering the Reformation Roots of American Marriage and Divorce Law' (2014) 26 Yale Law Journal 29
- Arnott S, 'Autonomy, Standing, and Children's Rights' (2007) 33 WM Mitchell Law Review 807
- Ashraf A, 'Forced Marriage and Health' (2015) 12 Diversity and Equality in Healthcare 89

- Askola H, 'Responding to Vulnerability? Forced Marriage and the Law' (2018) 41 *UNSW Law Journal* 977
- Atkinson J, 'Califano v. Jobst, Zablocki v. Redhail, and the Fundamental Right to Marry' (1979) 18 *Journal of Family Law* 587
- Bacik I, 'Developing an Understanding of "Compromised Consent": How Reconsideration of Consent as a Legal Concept May Inform a Feminist Theoretical Framework for the Introduction of "Nordic Model" Prostitution Laws and Did Inform the Motivations of Lawmakers in Ireland' [2022] PhD Thesis: School of Law, Trinity College Dublin
- Bagenstos S, *Law and the Contradictions of the Disability Rights Movement* (Yale University Press 2009)
- Baker C, 'California Law Eliminates Spousal Rape Exemption—But "Patriarchy Still Dies Hard"' *Ms. Magazine* (13 October 2021)
- Baker C and Stein N, 'Obscuring Gender-Based Violence: Marriage Promotion and Teen Dating Violence Research' (2016) 37 *Journal of Women, Politics & Policy* 87
- Baldacci M, 'Iraqi Immigrant Gets 34 Years for Killing "too Westernized" Daughter' *CNN* (16 April 2011)
- Bangura R, Tran T and Schermerhorn K, 'A Closer Look at Forced and Early Marriage in African Immigrant Communities in New York City' (Sauti Yetu Center for African Women 2012)
- Barnett R, 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269
- Barnett R, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78 *Virginia Law Review* 821
- Barr H, 'Delaware Ends Child Marriage; 49 To Go and Counting' [2018] Human Rights Watch <<https://www.hrw.org/news/2018/05/10/delaware-ends-child-marriage-49-go-and-counting>>
- Bartels K, 'Using Interpretive Policy Analysis (IPA) to Drive Positive Change' [2021] University of Birmingham
- Basu M, 'Sherry Johnson Was Raped, Pregnant and Married by 11. Now She's Fighting to End Child Marriage in America' *CNN* (29 January 2018)
- Bates L, 'Honor-Based Abuse in England and Wales: Who Does What to Whom?' (2021) 10 *Violence Against Women* 1774
- Baumeister H, 'Forced Marriage Real Simple' (2020) 1 *Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence* 25
- Bay C, *The Structure of Freedom* (Stanford University Press 1970)
- Bayles M, *A Concept of Coercion* (Routledge 1972)

Beauchamp T, 'Autonomy and Consent' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010)

Begum P, 'Should Forced Marriage Be Criminalised?' (2016)

Ben Maiz S, 'Forced Marriage in Muslim Asian Communities : Whose Right to Choose? The Plight of Women from South Asia to the U.K.' (2003)

Ben S, *A Theory of Freedom* (Cambridge University Press 1998)

Benoit A and Ronis S, 'A Qualitative Examination of Withdrawing Sexual Consent, Sexual Compliance, and Young Women's Role as Sexual Gatekeepers' (2022) 34 International Journal of Sexual Health 577

Bentham J, *The Principles of Morals and Legislation* (Hafner Publishing Co 1965)

Berman M, 'The Normative Functions of Coercion Claims' (2002) 8 Legal Theory

Bernstein D, 'Freedom of Contract' [2008] George Mason University Law and Economics Research Paper Series

Bevan H, *Child Law* (Butterworths 1989)

Bierschbach B, 'This Woman Fought To End Minnesota's "Marital Rape" Exception, And Won' *NPR* (4 May 2019)

Bix B, 'Contracts' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010)

Bix B, 'State Interests in Marriage, Interstate Recognition, and Choice of Law' (2005) 38 Creighton Law Review 337

Black's Law Dictionary (12th edition, 2024)

Blake N, *The Road to Reno: A History of Divorce in the United States* (Macmillan and Co 1962)

Bohkari F, 'Stolen Futures: Trafficking for Forced Child Marriage in the UK' (ECPAT UK 2009)

Boni-Saenz A, 'Sexuality and Incapacity' (2015) 79 Ohio State Law Journal 1201

Bosworth T, 'The Federal Constitutional Right to Divorce' (2004) 14 Contemporary Legal Issues 103

Boucai M, 'Before Loving: The Lost Origins of the Right to Marry' (2020) 2020 Utah Law Review 69

Bowers L and Linn B, 'The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded People - The Eternal Child Grows Up' (1977) 13 Gonz. L. Rev. 625

Bradford L, 'The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws' (1997) 49 Stanford Law Review 607

Brah A and Gill A, 'Interrogating Cultural Narratives about "Honor" Based Violence' (2014) 21 *European Journal of Women's Studies* 72

Brakel S, Parry J and Weiner B, 'The Mentally Disabled and the Law' [1985] American Bar Foundation

Bredal A, 'Arranged Marriages as a Multicultural Battle Field' in M Mette Andersson, Y Lithman and O Sernhede (eds), *Youth, Otherness, and the Plural City: Modes of Belonging and Social Life, Daidalos* (Gothenburg 2005)

Brewer H, *By Birth or Consent: Children Law and the Anglo-American Revolution in Authority* (University of North Carolina Press 2005)

Brock M and Buckthall E, 'Historical Overview of U.S. Policy and Legislative Responses to Honor-Based Violence, Forced Marriage, and Female Genital Mutilation/Cutting' [2018] NIJ Report

Brown R, 'Duress and Fraud as Grounds for the Annulment of Marriage' (1935) 10 *Indiana Law Journal* 473

Brownlee K, 'Freedom of Association: It's Not What You Think' (2015) 35 *Oxford Journal of Legal Studies* 267

Buck C, Hemez P and Anderson L, 'U.S. Divorce Rates Down, Marriage Rates Stagnant From 2012-2022' (United States Census Bureau 2024)

Burnham M, *An Impossible Marriage: Slave Law and Family Law* (1987)

Burris C, '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' (2014) 23 *Tulane Journal of International and Comparative Law* 151

Cain P, 'Imagine There's No Marriage' (1996) 16 *QLR* 27

Campbell T, 'The Rights of the Minor' in P Alston, S Parker and J Seymour (eds), *Children Rights and the Law* (Clarendon Press 1992)

Carbone J and Cahn N, 'Family Law and Emotion' in S Bandes and others (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Ltd 2021)

Carr C, 'Coercion and Freedom' (1998) 25 *American Philosophical Quarterly* 59

Chantler K, 'Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse' (2012) 13 *Trauma, Violence, & Abuse* 176

Chantler K, 'Understanding Forced Marriage in Scotland' (Government of Scotland Social Research 2017)

Chantler K, Gangoli G and Hester M, 'Forced Marriage in the UK: Religious, Cultural, Economic or State Violence?' (2009) 29 *Critical Social Policy* 587

Chantler K and McCarry M, 'Forced Marriage, Coercive Control, and Conducive Contexts: The Experiences of Women in Scotland' (89) 26 *Violence Against Women* 2019

Chemerinsky E, 'Substantive Due Process' (1999) 15 *Touro Law Review* 1501

Chen-Wishart M, 'Undue Influence: Beyond Impaired Consent and Wrongdoing towards a Relational Analysis', *Mapping the Law* (2006)

Chen-Wishart M, 'The Nature of Vitiating Factors in Contract Law' in G Klass, G Letsas and P Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014)

Child Bride (Directed by H Reviver, Astor Pictures 1938)

Choi M, "'Somebody Needs to Get Fired': Vicente Gonzalez Blasts Dem Strategy on Abortion, Trans Issues' *The Texas Tribune* (6 November 2024)
<<https://www.texastribune.org/2024/11/26/texas-vicente-gonzalez-congress-democrats-abortion-transgender/>>

Christie C, 'Statement on Gubernatorial Veto of HBA3091'

Clawson R and Fyson R, 'Forced Marriage of People with Learning Disabilities: A Human Rights Issue' (2017) 32 *Disability and Society* 610

Cocca C, 'Chapter 1: Statutory Rape Laws in a Historical Context', *Jailbait the politics of statutory rape laws in the United States* (Albany: State University of New York Press 2004)

Cocca C, *Jailbait: The Politics of Statutory Rape Laws in the United States* (Albany: State University of New York Press 2004)

Cockburn T, 'Authors of Their Own Lives? Children, Contracts, Their Responsibilities, Rights and Citizenship' (2013) 21 *The International Journal of Children's Rights* 372

Cohen L, 'Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life"' (1987) 16 *The Journal of Legal Studies* 267

Colker R, 'An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class' [1991] *Duke Law Journal* 324

Collons K, 'Administering Marriage: Marriage-Based Entitlements, Bureaucracy and the Legal Construction of the Family' (2009) 62 *Vanderbilt Law Review* 1085

Commonwealth of Massachusetts, 'Find out If You're Eligible to Get an Annulment'
<<https://www.mass.gov/info-details/find-out-if-youre-eligible-to-get-an-annulment>> accessed 10 March 2025

Congressional Research Service, 'Application of the Bill of Rights to the States Through the Fourteenth Amendment and Selective Incorporation' (2024)

Conkle D, 'Three Theories of Substantive Due Process' (2006) 85 *North Carolina Law Review* 63

Connecticut House Democrats, 'Rep. Keitt Applauds Passage & Signing of Bill Banning Child Marriage in Connecticut' (23 June 2023) <<https://www.housedems.ct.gov/node/25849>>

Connecticut Judicial Branch, 'Qualifying for a Civil Annulment in Connecticut' <https://jud.ct.gov/lawlib/palm_cards/Civil_Annulment.pdf> accessed 10 March 2025

Consular Affairs, 'Foreign Affairs Manual Volume' (United States Department of State 2005) 7

Coontz S, *Marriage, a History: How Love Conquered Marriage* (Penguin books 2006)

Cott N, *Public Vows: A History of Marriage and the Nation* (Harvard University Press 2002)

Cramer M, 'When Are You Really an Adult?' *New York Times* (19 January 2020)

Crossroads Family Law and Mediation South Carolina, 'Marriage and Annulment' <<http://crossroadsfamilylaw.com/south-carolina-legal-services-divorce-video/>> accessed 10 March 2025

Crown Prosecution Service, *Honour-Based Violence and Forced Marriage* (The Code for Crown Prosecutors 2019)

Dahl G, 'Early Teen Marriage and Future Poverty' (2010) 47 *Demography* 689

Dank M and others, 'Exploratory Research into the Intersection of Forced Marriage, Intimate Partner Violence, and Sexual Violence' (National Institute of Justice 2018)

Dank M and others, 'Exploratory Research into the Intersection of Forced Marriage, Intimate Partner Violence, and Sexual Violence' (Report to National Institute of Justice 2018)

Davidson H, 'The Child's Right to Be Heard and Represented in Judicial Proceedings' (1991) 18 *Pepperdine Law Review* 255

Day J, 'Threats, Offers, Law, Opinion, and Liberty' (1977) 14 *American Philosophical Quarterly* 257

Decker J and Baroni P, 'No Still Means Yes: The Failure of the Non-Consent Reform Movement in American Rape and Sexual Assault Law' (2011) 101 *Journal of Criminal Law and Criminology* 1081

DeJong G, 'Defining and Implementing the Independent Living Concept', *Independent Living for Physically Disabled People* (iUniverse 2001)

Delaware Public Media, 'First State Ban on Child Marriage Clears General Assembly' (3 May 2018) <https://www.delawarepublic.org/politics-government/2018-05-03/first-state-ban-on-child-marriage-clears-general-assembly>

Delaware Public Media, 'Proposed Legislation Would Ban All Child Marriages in Delaware' (17 March 2018) <<https://www.delawarepublic.org/politics-government/2018-03-17/proposed-legislation-would-ban-all-child-marriages-in-delaware>>

Denno D, 'Sexuality Rape and Mental Retardation' [1997] University of Illinois Law Review 315

Department of Homeland Security, 'Myths and Misconceptions' <<https://www.dhs.gov/blue-campaign/myths-and-misconceptions>> accessed 6 March 2025

Department of Justice, 'Understanding Human Trafficking Fact Sheet' (2025)

'Developments in the Law: The Constitution and the Family' (1980) 93 Harvard Law Review 1156

DiDomenico Z, 'Engaged in Fraud: Detecting Sham Marriages within the Bounds of the Constitution', (2023) 72 DePaul Law Review 703

Dougherty T, 'Yes Means Yes: Consent as Communication' (2015) 43 Philosophy & Public Affairs 224

Dougherty T, 'Why Does Duress Undermine Consent?' (2019) 55 Noûs 317

Dubin S and others, 'Medically Assisted Gender Affirmation: When Children and Parents Disagree' (2022) Journal of Medical Ethics

Dubler A, 'Governing through Contract: Common Law Marriage in the Nineteenth Century' (1998) 107 The Yale Law Journal 1885

DuBois Cook S, 'Coercion and Social Change', *Coercion* (Routledge 1972)

Durnová A, 'Making Interpretive Policy Analysis Critical and Societally Relevant: Emotions, Ethnography and Language' (2022) 50 Policy and Politics 43

Dustin M and Phillips A, 'Whose Agenda Is It? Abuses of Women and Abuses of "Culture" in Britain' (2008) 8 Ethnicities 405

Ebeturk I and Cowart O, 'Criminalization of Forced Marriage in Europe: A Qualitative Comparative Analysis' (2017) 58 International Journal of Comparative Sociology 169

'Editorial: The Abolition of Polygamy (Mr. Cullom's Anti-Polygamy Bill)' *The Chicago Tribune* (1870)

Eekelaar J, 'The Emergence of Children's Rights' (1986) 6 Oxford Journal of Legal Studies

Eekelaar J, 'Families and Children: From Welfarism to Rights' in C McCrudden and G Chambers, *Individual Rights and Law in Britain* (Clarendon Press 1994)

Eisenberg M, 'Relational Contracts' in J Beatson and D Friedmann, *Good Faith and Fault in Contract Law* (Clarendon Press 1995)

'Emancipation' (Maine Judiciary Branch)

<<https://www.courts.maine.gov/courts/family/emancipation.html#:~:text=Emancipation%20is%20the%20legal%20process,the%20same%20as%20an%20adult.>> accessed 10 March 2025

Emmens E, 'Intimate Discrimination: The State's Role in the Accidents of Sex and Love' (2009) 122 Harvard Law Review 1307

Emmerglick L, 'Nullity of Marriage for Fraud' 19 Kentucky Law Journal 295

Enright M, 'Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arranged Marriage' (2009) 72 The Modern Law Review 331

Esthappan S and others, 'Understanding Forced Marriage in the United States: Developing Measures, Examining Its Nature, and Assessing Gender Disparities' (2021) 36 Journal of Interpersonal Violence 5730

Evans D, 'Marriage Equality' (Center for Disability Rights) <<https://cdrnys.org/blog/disability-dialogue/the-disability-dialogue-marriage-equality/>> accessed 4 February 2025

European Union Agency for Fundamental Rights, 'Addressing Forced Marriage in the EU: Legal Provisions and Promising Practices' (2014)

Fallon Jr. R, 'Strict Judicial Scrutiny' (2007) 54 UCLA Law Review 1267

Farson R, *Birthrights* (Collier Macmillan 1974)

Faucon C, 'Marriage Outlaws: Regulating Polygamy in America' (2014) 22 Duke Journal of Gender, Law & Policy 1

Feinberg J, 'The Child's Right to an Open Future' in W Aiken and H LaFollette (eds), *Whose Child?* (Littlefield, Adams & Co 1980)

Feinberg J, *Harm to Self: The Moral Limits of Criminal Law* (Oxford University Press USA 1986)

Feinglos R and Laurenzi S, 'America Makes It Too Hard and Dangerous to Get Divorced' *TIME* (27 April 2023)

Ferzan K, 'Consent and Coercion' (2018) 50 Arizona State Law Journal 951

Feuerherd P, 'Why Covenant Marriage Failed to Take Off' (*JSTOR Daily*, 11 February 2019) <<https://daily.jstor.org/why-covenant-marriage-failed-to-take-off/>>

Field M and Sanchez V, 'Equal Treatment for People With Mental Retardation: Having and Raising Children' [1990] Harvard University Press

Fineman M, *The Autonomy Myth* (New Press 2004)

Fischel J and O'Connell H, 'Disabling Consent, or Reconstructing Sexual Autonomy' (2015) 30 Columbia Journal of Gender and Law 428

Fisher C, "'Strict in Theory, Fatal in Fact": The Phrase That Rings True in Recent Voting Rights Cases' (2023) 54 Pacific Law Review 391

FitzGibbon S, 'A City Without Duty, Fault, or Shame' in R Wilson (ed), *Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution* (Cambridge University Press 2006)

Fitzpatrick E, 'R.I. Senate Unanimously Votes to Remove Spousal Exemption for Rape of Incapacitated Victims' *Boston Globe* (15 June 2021)

Florida Courts, 'Annulment' <<https://www.flcourts.gov/content/download/862646/file/Everything%20Else%20-%20ANNULMENT.pdf>> accessed 10 March 2025

Forced Marriage Unit, 'Dealing with Cases of Forced Marriage. Guidance for Police Officers' (Home Office 2005)

Forced Marriage Unit, 'The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage' (UK Home Office 2008)

Forced Marriage Unit, 'What Is Forced Marriage in the LGBT Community?' (Home Office 2013)

Forced Marriage Unit, 'Multi-Agency Practice Guidelines: Handling Cases of Forced Marriage' (Home Office 2014)

Forced Marriage Unit, Clawson R and Vallance R, 'Forced Marriage and Learning Disabilities: Multi-Agency Practice Guidelines' (Home Office 2009)

Foreign and Commonwealth Office, 'Forced Marriage – a Wrong Not a Right' (2005)

Foreign and Commonwealth Office, Home Office and NHS, 'Dealing with Cases of Forced Marriage. Guidance for Health Professionals' (2007)

Fortin J, *Children's Rights and the Developing Law* (Cambridge University Press 2011)

Fradella H and Brown K, 'Withdrawal of Consent Post-Penetration: Redefining the Law of Rape' (2005) 14 Criminal Law Bulletin 3

Frankfurt H, 'Coercion and Moral Responsibility', *Essays on Freedom of Action* (Routledge Kegan Paul 1973)

Frankfurt H, 'Freedom of the Will and the Concept of a Person' 127

Franklin B (ed), *The New Handbook of Children's Rights: Comparative Policy and Practice* (Routledge 2002)

Frantz C and Dagan H, 'Properties of Marriage' (2004) 104 Columbia Law Review 75

'Fraud and Annulment in New York' (1941) 41 Columbia Law Review 475

Freed D and Foster H, 'Divorce in the Fifty States: An Overview' (1981) 14 Family Law Quarterly 229

- Freedman S, 'Woman Breaks through Chains of Forced Marriage, and Helps Others Do the Same' *The New York Times* (20 March 2015)
- Friedberg L, 'Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data' (1998) 88 *American Economic Review* 608
- Gaines L and Miller L, *Criminal Justice in Action*, vol 4 (Thomson Wadsworth 2007)
- Galloway R, 'Basic Substantive Due Process Analysis' (1992) 26 *University of San Francisco Law Review* 625
- Galston W, 'Two Concepts of Liberalism' (1995) 105 *Ethics* 516
- Gan O, 'Contractual Duress and Relations of Power' (2013) 36 *Harvard Journal of Law and Gender* 172
- Gangoli G and others, 'Understanding Forced Marriage: Definitions and Realities', *Forced Marriage: Introducing a Social Justice and Human Rights Perspective* (Zed Books 2011)
<Forced Marriage: Introducing a Social Justice and Human Rights Perspective>
- Gangoli G and Chantler K, 'Protecting Victims of Forced Marriage: Is Age a Protective Factor' (2009) 17 *Feminist Legal Studies* 267
- Gangoli G, Chantler K and Razak A, 'Child Marriage or Forced Marriage: South Asian Communities in North East England' (2009) 23 *Children and Society* 418
- Gangoli G and McCarry M, 'Criminalising Forced Marriage' (2008) 74 *Centre for Crime and Justice Studies* 44
- Gangoli G, Razak A and McCarry M, 'Forced Marriages and Domestic Violence Among South Asian Communities in North East England' (Northern Rock Foundation and University of Bristol 2006)
- Gibson S, 'NH Outlaws Child Marriage, Raising the Legal Age to 18' *New Hampshire Public Radio* (18 June 2024) <<https://www.nhpr.org/nh-news/2024-06-18/nh-outlaws-child-marriage-raising-the-legal-age-to-18>>
- Gil D, 'Opinions and Attitudes', *Violence against Children* (Harvard University Press 1973)
- Gill A and Anitha S, 'The Illusion of Protection? An Analysis of Forced Marriage Legislation and Policy in the UK' (2009) 21 *Journal of Social Welfare and Family Law* 257
- Gill A and Anitha S, 'Forced Marriage Legislation in the UK: A Critique', *Forced Marriage: Introducing a Social Justice and Human Rights Perspective* (Zed Books 2011)
- Gill A, Anitha S and Warria A, 'Forced Child Marriages as a Form of Child Trafficking' (2017) 79 *Children and Youth Services Review* 274
- Gill A and Gould D, 'The Role of Family Coercion, Culture, Expert Witnesses and Best Practice in Securing Forced Marriage Convictions' (2020) 4 *Journal of Gender-Based Violence* 89

- Gill A and Hamed T, 'Muslim Women and Forced Marriage in the United Kingdom' (2016) 36 *Journal of Muslim Minority Affairs* 540
- Gill A and Harvey H, 'Examining the Impact of Gender on Young People's Views of Forced Marriage in Britain' (2016) 12 *Feminist Criminology*
- Gill A and Mitra-Kahn T, 'Modernising the "Other": Assessing the Ideological Underpinnings of the Policy Discourse on Forced Marriage in the UK' [2010] *Journal of Policy and Politics*
- Girls Not Brides, 'Mexico' <<https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/mexico/>> accessed 10 January 2025
- Glezer A and Devido J, 'Evolution of the Capacity to Marry' (2017) 45 *J Am Acad Psychiatry Law* 292
- Goldstein A, 'Am I Eligible for an Annulment in Tennessee?' (Cole Law 2022) <https://www.colelawgroup.com/blog/am-i-eligible-for-an-annulment-in-tennessee/#_edn2>
- Goldstein J, Freud A and Solnit A, *Beyond the Best Interests of the Child* (New York Free Press 1973)
- Goodwin M, 'Law's Limit: Regulating Statutory Rape Laws' [2013] *Wisconsin Law Review* 481
- Gordon S, "'The Twin Relic of Barbarism": A Legal History of Anti-Polygamy in Nineteenth-Century America' [1995] Ph.D. diss., Princeton University 174
- Gordon S, "'Our National Hearthstone": Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America' (1996) 8 *Yale Journal of Law & the Humanities* 295
- Goring D, 'The History of Slave Marriage in the United States' (2006) 39 *J. Marshall Law Review* 299
- Green L, 'Rights of Exit' (1998) 4 *Legal Theory* 165
- Gregory J, Swisher P and Wilson R, *Understanding Family Law* (4th edn, Carolina Academic Pr 2013)
- Grossi R, 'What Can Contract Law Learn from #MeToo?' (2022) 49 *Journal of Law and Society* 263
- Grossman J, 'Annulments Based on Fraud: What Is the Essence of a Marriage?' [2010] *FindLaw Legal Commentary*
- Guggenheim M, *What's Wrong With Children's Rights?* (Harvard University Press 2005)
- Haenen I, 'The Parameters of Enslavement and the Act of Forced Marriage' (2013) 13 *International Criminal Law Review* 895
- Hafen B, 'The Family as an Entity' (1989) 22 *U.C. Davis L. Rev.* 865

- Hammond J, Cole B and Beck S, 'Religious Heritage and Teenage Marriage' (1993) 35 *Review of Religious Research* 117
- Harding L, *Perspectives in Child Care Policy* (Longman 1997)
- Harr R and Duncan B, 'Legislating and Enforcing the Minimum Age of Marriage: A Comparative Study of Experiences and Lessons Learned in Ending the Legalization of Child Marriage' (UN Women 2023)
- Harris J, 'Sexual Consent and Disability' (2018) 93 *New York University Law Review* 480
- Hartford Courant, 'Since You Asked: 1895 Marriage Law Aimed at People with Mental Disabilities' (27 February 2008)
- Healey R, 'Consent, Interaction, and the Value of Shared Understanding' (2022) 28 *Legal Theory* 35
- Heinig M, 'No-Fault Divorce vs. Fault Divorce' *NOLO* (21 April 2023)
<<https://www.nolo.com/legal-encyclopedia/no-fault-divorce-vs-fault-divorce-faq.html>>
- Herring J, 'Relational Autonomy and Family Law' in J Wallbank, S Choudhry and J Herring, *Rights Gender and Family Law* (Routledge-Cavendish 2010)
- Hester M, *Lewd Women and Wicked Witches: A Study of the Dynamics of Male Domination* (Routledge 1992)
- Hester M, 'Forced Marriage: The Risk Factors and the Effect of Raising the Minimum Age for a Sponsor, and of Leave to Enter the UK as a Spouse or Fiancé(e)' (School for Policy Studies, University of Bristol and School of Nursing, Midwifery and Social Work, University of Manchester 2008)
- Hirschmann N and Linker B (eds), *Civil Disabilities: Citizenship, Membership, and Belonging* (University of Pennsylvania Press 2015)
- Hoerock B, 'New Oklahoma Senator Files Bill That Would End No-Fault Divorces in the State' *Oklahoma Voice* (26 January 2024)
- Holt J, *Escape from Childhood: The Needs and Rights of Childhood* (EP Dutton and Co Inc 1974)
- Human Rights Watch, 'US: New York Governor Signs Anti-Child Marriage Law' (20 June 2017)
<<https://www.hrw.org/news/2017/06/20/us-new-york-governor-signs-anti-child-marriage-law>>
- Hurd H, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121
- Husak D, 'Paternalism and Consent' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010)
- Idriss M, 'Abused by Patriarchy: Male Victims, Masculinity, "Honor"-Based Abuse and Forced Marriages' (2022) 37 *Journal of Interpersonal Violence* NP11905

Igareda Gonzalez N and Barcons Campmajo M, 'Approaching Forced Marriages as a New Form of Trafficking in Human Beings in Europe' (Ghent University, Autonomous University of Barcelona, and CentroScienza Onlus 2015)

International Labor Organization, 'Global Estimates of Modern Slavery: Forced Labour and Forced Marriage' (2022)

Interview with JD Vance, 'Speech at Pacifica Christian High School' (September 2022)

Jay J, 'It's Not about Enactment - It's about Enforcement: Why Pakistan and the United States Are Unable to Effectuate Their Laws Restricting Forced Marriage' (2020) 24 *Gonzaga Journal of International Law* 91

Johnson A, *Gender Knot* (Temple University Press 1997)

Johnson M, 'Preserving Liberty' (Christian Center Shreveport, 2016)

Johnston D, 'A History of Consent in Western Thought' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010)

Jones J, 'The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?' (1997) 24 *Florida State University Law Review* 679

Joseph C, 'JD Vance Suggests People in "Violent" Marriages Shouldn't Get Divorced' *Vice News* (25 July 2022)

Kahan D, 'The Anatomy of Disgust in Criminal Law' (1998) 96 *Michigan Law Review* 1621

Kakar S, 'Child/Forced/Servile Marriages $\rightleftharpoons$ Human Trafficking' in J Winterdyk and J Jones (eds), *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan 2019)

Kalevitch L, 'Gaps in Contracts: A Critique of Consent Theory' (1993) 54 *Montana Law Review*

Kaur H, 'Pennsylvania Has Become the Latest State to Ban Child Marriage – but It's Still Not Fully Outlawed in 47 Others' *CNN* (11 May 2020)
<[Keyes E, 'Duress in Immigration Law' \(2021\) 1 *Seattle University Law Review* 307](https://edition.cnn.com/2020/05/11/us/pennsylvania-outlaws-child-marriage-trnd/index.html#:~:text=Tom%20Wolf%20signed%20into%20law,of%20a%20parent%20or%20guardian.>></p></div><div data-bbox=)

Khalil J, 'Virginia Lawmakers Have Voted to Raise the Marriage Age to 18. Most States Haven't' *NPR* (4 April 2024)

Kingsley R, 'Fraud as a Ground for Annulment of a Marriage' (1945) 18 *Southern California Law Review* 165

Klarman M, 'An Interpretive History of Modern Equal Protection' (1991) 90 *Michigan Law Review* 213

Kleinig J, 'The Nature of Consent' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010)

Kopelman L, 'The Forced Marriage of Minors: A Neglected Form of Child Abuse' (2016) 44 *Journal of Law, Medicine & Ethics* 173

Koski A and Heymann J, 'Child Marriage in the United States: How Common Is the Practice, and Which Children Are at Greatest Risk?' (2018) 50 *Perspectives on Sexual and Reproductive Health* 59

Kramer A and others, 'The Impact of Parental Involvement Laws on Minors Seeking Abortion Services: A Systematic Review' (2023) 1 *Health Affairs Scholar* 4

Kristjansson K, 'Freedom, Offers, and Obstacles' (1992) 29 *American Philosophical Quarterly* 63

Krugger A, 'What Is Covenant Marriage?' *New York Times* (3 November 2023)

Kukathas C, 'Are There Any Cultural Rights?' (1992) 20 *Political Theory* 105

LaFrance Law Group, 'Everything You Needs to Know About Annulment in Florida' (20 September 2022) <<https://www.lafrancelaw.com/blog/everything-you-need-to-know-about-annulments-in-florida/>>

Landau E, 'Custom or Crime? Part II of IV: Legal Remedies for Forced Marriage Victims and Survivors' (2016) 29 *American Journal of Family Law* 227

Lawton M, 'The Constitutionality of Covenant Marriage Laws' (1998) 66 *Fordham Law Review* 2471

Lazerow H, 'Mental Incompetency as Grounds for Divorce'

Leckey R, 'Relational Contract and Other Models of Marriage' (2002) 40 *Osgoode Hall Law Journal* 1

Lee C, *Prostitutes and Picture Brides: Chinese and Japanese Immigration, Settlement, and American Nation-Building, 1870-1920* (Center for Comparative Immigration Studies, University of California, San Diego 2003)

Lee F, 'Influential Study on Divorce's Impact Is Said to Be Flawed' *New York Times* (9 May 1996)

Lefkowitz A, 'The Right Aims to Turn Back the Clock on American Divorce Law' *TIME* (23 July 2024)

LeFrancois A, 'The Constitution and the Right to Marry: A Jurisprudential Analysis' (1980) 5 *Oklahoma City University Law Review* 507

Lenhardt R, 'Race, Dignity, and the Right to Marry' (2015) 84 *Fordham Law Review* 53

- Leonhard C, 'The Unbearable Lightness of Consent in Contract Law' (2012) 63 Case Western Law Review 57
- Libson A, 'Not My Fault: Morality and Divorce Law in the Liberal State' (2019) 93 Tulane Law Review 599
- Linder A, 'Capacity to Consent to Sexual Activity Among Those with Developmental Disabilities' [2018] Stanford Intellectual and Development Disabilities Law and Policy Project
- Loo J, 'Divorce: More than a Century of Change, 1900-2022' (National Center for Family and Marriage Research 2024) Family Profile No. 11, 2024
- Love H and others, 'The Complexities and Challenges of Researching Forced Marriage in the US' (2017) 10
- Love H and others, 'Navigating an Unclear Terrain: Challenges in Recognizing, Naming, and Accessing Services for "Forced Marriage"' (2019) 25 Violence Against Women 1138
- Lucas JR, *The Principles of Politics* (The Clarendon Press 1966)
- Lyons D, 'The Last Word on Coercive Offers' (1982) 8 Philosophy Research Archives 393
- MacCormick N, *Legal Right and Social Democracy: Essays in Legal and Practical Political Philosophy* (Clarendon Press 1982)
- Macneil I, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press 1980)
- Macneil I, 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a 'Rich Classificatory Apparatus' (1981) 75 Northwestern University Law Review 1018
- Macneil I, *Contracts: Exchange Transactions and Relations, Cases and Materials* (2001)
- Maine Divorce Group, 'Maine Annulment' (2025)
<<https://www.themainedivorcegroup.com/divorce/maine-annulment-prohibited-marriages-attorneys/>>
- Manson N, 'Permissive Consent: A Robust Reason-Changing Account' (2016) 173 Philosophical Studies 3317
- Marcus A and others, 'Between Choice and Obligation: An Exploratory Assessment of Forced Marriage Problems and Policies among Migrants in the United States' [2017] Cambridge University Press
- Marin M, 'Care, Oppression, and Marriage' (2014) 29 Hypatia 337
- Martin L, 'Restraining Forced Marriage' [2017] SSRN Electronic Journal
<<https://www.ssrn.com/abstract=2962589>> accessed 27 December 2021
- Marvell T, 'Divorce Rates and the Fault Requirement' (1989) 23 Law and Society Review 543

Matloff J, 'Idiocy, Lunacy, and Matrimony Exploring Constitutional Challenges to State Restrictions on Marriages with Persons with Mental Disabilities' (2009) 17 Am U J Gender Soc Pol'y & L 497

Matsumura K, 'A Right Not to Marry' (2016) 84 Fordham Law Review 1509

Matthews F, 'Mental Incapacity as Affecting Consent to the Marriage Contract' (1929) 14 St. Louis L Rev 422

Mayer-Schonberger V, 'Substantive Due Process and Equal Protection in the Fundamental Rights Realm' (1990) 33 Howard Law Journal 287

McFarlane J and others, 'Child Brides, Forced Marriage, and Partner Violence in America: Tip of an Iceberg Revealed' (2016) 127 Obstetrics & Gynecology 706

McGoldrick Jr. J, 'The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective' (2018) 55 San Diego Law Review 751

McLean S, *Autonomy, Consent and the Law* (Routledge 2009)

Micek J, 'The Child's Right of Access to the Courts' (2000) 11 J Contemp Legal Issue 656

Miller F and Wertheimer A, 'Preface to a Theory of Contract Transactions: Beyond Valid Consent' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010)

Minnesota House of Representatives, 'Governor Walz Signs Bill to End Child Marriages' (14 May 2020) <<https://www.house.mn.gov/members/profile/news/15532/29817>>

Moore K, 'Disabled Autonomy' (2020) 22 Journal Health Care Law & Policy 245

Morin K, 'Understanding the Practice of Early and Forced Marriage in North America and Its Effects on Women' [2017] Samuel Centre for Social Connectedness 35

Moslimani M and Passel J, 'What the Data Says about Immigrants in the U.S.' (Pew Research Center 2024)

Mueller S, 'Delaware Expected To Be The First State To Ban Child Marriage Outright' *NPR* (3 May 2018) <<https://www.kpbs.org/news/2018/05/03/delaware-expected-to-be-the-first-state-to-ban>>

Murphy T, 'A Matter of Force: The Redefinition of Rape' (1995) 39 Air Force Law Review 19

Musgrove W, 'Substantive Due Process: A History of Liberty in the Due Process Clause' (2008) 2 St. Thomas Journal of Law and Public Policy 125

Nachbar T, 'The Rationality of Rational Basis Review' (2016) 102 Virginia Law Review 1627

Nakonezny P, 'The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity' (1995) 57 Marriage and Family 477

National Counsel on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* (2018)

National Low Income Housing Coalition, 'Supplemental Security Income Restoration Act Reintroduced' (14 June 2021) <<https://nlihc.org/resource/supplemental-security-income-restoration-act-reintroduced>>

National Domestic Violence Hotline, 'Marital Rape and Domestic Violence' <<https://www.thehotline.org/resources/marital-rape-and-domestic-violence/>> accessed 10 February 2025

National Human Trafficking Hotline, 'Myths & Facts' <<https://humantraffickinghotline.org/en/human-trafficking/myths-facts>> accessed 6 March 2025

Nebraska GOP, 'Family' <<https://ne.gop/family/>> accessed 3 March 2025

Neil M, 'What to Expect at a Stokes Interview' (*FindLaw*, 27 June 2023) <<https://www.findlaw.com/immigration/visas/what-to-expect-at-a-stokes-interview.html>> accessed 3 March 2025

Nejaime D, 'Windsor's Right to Marry' (2013) 123 Yale Law Journal Online 219

New York American, 'Wed When Jerome's Aide Threatened Jail' (4 May 1906)

Noack-Lundberg K, Gill A and Anitha S, 'Understanding Forced Marriage Protection Orders in the UK' (2021) 43 Journal of Social Welfare and Family Law 371

Nowak J, Rotunda R and Young J, *Principles of Constitutional Law* (3rd edn, West 1986)

Nozick R, 'Coercion', *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (St Martin's Press 1969)

Odem M, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920* (The University of North Carolina Press 2000)

O'Donoghue J, 'Louisiana Republican Party Considers Backing Elimination of No-Fault Divorce' *New Orleans Public Radio* (12 January 2023)

Office of Assembly Speaker Carl E. Heastie, 'Assembly Passes Legislation to Expand Protections in the Child Marriage Law, Making 18 the Age of Consent to Marry' (3 June 2021) <https://assembly.state.ny.us/Press/?sec=story&story=97376>

Office of Governor Gretchen Whitmer, 'Gov. Whitmer Signs Final Bill in Package Protecting Children, Officially Banning Child Marriage in Michigan' (27 September 2023) <<https://www.michigan.gov/whitmer/news/press-releases/2023/09/27/whitmer-signs-final-bill-in-package-protecting-children-officially-banning-child-marriage>>

Office of Governor Dan McKee, 'Governor McKee Signs Two Bills into Law' (7 June 2021) <<https://governor.ri.gov/press-releases/governor-mckee-signs-two-bills-law>>

Office of Governor Phil Murphy, 'Governor Phil Murphy Signs Child Marriage Ban into Law' (22 June 2018)

https://www.nj.gov/governor/news/news/562018/20180622b_child_marriage_ban.shtml

Office of Representative Jimmy Panetta, 'Rep. Panetta Authors and Reintroduces Legislation to Ensure Marriage Equality for Disabled Adults' (28 January 2023)

<https://panetta.house.gov/media/press-releases/rep-panetta-authors-and-reintroduces-legislation-ensure-marriage-equality>

Office of Representative Monica Stonier, 'Stonier Bill to End Child Marriage in WA Signed by Governor' (8 March 2024) <<https://housedemocrats.wa.gov/stonier/2024/03/08/stonier-bill-to-end-child-marriage-in-wa-signed-by-governor/>>

Office of Senator Dave Cortese, 'Bill to End Spousal Rape Distinction Is Signed by Governor' (7 October 2021) <<https://sd15.senate.ca.gov/news/bill-end-spousal-rape-distinction-signed-governor>>

Office of the United Nations High Commissioner for Human Rights, 'Child and Forced Marriage, Including in Humanitarian Settings'

Office of the United Nations High Commissioner for Human Rights, 'Preventing and Eliminating Child, Early and Forced Marriage' (2014) A/HRC/26/22

O'Herron M, 'Ending the Abuse of the Marriage Fraud Act' (1993) 7 Georgetown Immigration Law Journal 549

Okin S, 'Mistresses of Their Own Destiny': Group Rights, Gender, and Realistic Rights of Exit' (2002) 112 Ethics 205

Oliveri R, 'Statutory Rape Law and Enforcement in the Wake of Welfare Reform' (2000) 52 Stanford Law Review 463

Oman N, 'Specific Performance and the Thirteenth Amendment' (2009) 93 Minnesota Law Review 2020

O'Neill O, 'Children's Rights and Children's Lives' in P Alston, S Parker and J Seymour (eds), *Children Rights and the Law* (Clarendon Press 1992)

O'Shea T, 'Consent in History, Theory, and Practice' [2011] Essex Autonomy Project

Outtarra M, Sen P and Thompson M, 'Forced Marriage, Forced Sex: The Perils of Childhood for Girls' (1998) 6 Gender and Development 27

Oxford University Press, *Oxford English Dictionary*

Pallikkathayil J, 'Consent to Sexual Interactions' (2019) 19 Politics, Philosophy & Economics

Park A, 'The Marriage Fraud Act Revised: The Continuing Subordination of Asian and Pacific Islander Women' (1993) 1 Asian American Pacific Islands Law Journal 29

Parkman A, 'Reforming Divorce Reform' (2001) 41 Santa Clara Law Review 379

Paviour B, 'Virginia Might End "Loophole" in Child Marriage Law' *Virginia Public Media* (5 February 2024) <<https://www.vpm.org/news/2024-02-05/virginia-child-minor-marriage-parental-consent-emancipation-law>>

Pederdesen J, 'Transgender Bills on the Move in Florida Legislature' *Central Florida Public Media* (21 March 2023)

Perlin M and Lynch A, 'All His Sexless Patients: Persons with Mental Disabilities and the Competence to Have Sex' (2014) 89 *Washington Law Review* 257

Perske R, 'Dignity of Risk and the Mentally Retarded' (1972) 10 *Mental Retardation* 1

Petroni S, Das M and Sawyer S, 'Protection versus Rights: Age of Marriage versus Age of Sexual Consent' (2019) 3 *The Lancet Child & Adolescent Health* 274

Phillips A and Dustin M, 'UK Initiatives on Forced Marriage: Regulation, Dialogue and Exit' (2004) 52 *Political Studies* 531

Pintair O, 'Phil Scott Signs Bill Raising the Legal Age for All Marriages in Vermont to 18 Years Old' *Vermont Digger* (20 April 2023) <<https://vtdigger.org/2023/04/20/phil-scott-signs-bill-raising-the-legal-age-for-all-marriages-in-vermont-to-18-years-old/>>

Porter K, *National Party Platforms* (1924)

Psaila E and others, 'Forced Marriage from a Gender Perspective' (European Parliament Committee on Women's Rights and Gender Equality 2016)

Pull J, 'Questioning the Fundamental Right to Marry' (2006) 90 *Marquette Law Review* 21

Quek K, 'A Civil Rather Than Criminal Offence? Forced Marriage, Harm and the Politics of Multiculturalism in the UK' (2012) 15 *The British Journal of Politics and International Relations* 626

Rapp C, 'Lies, Damned Lies, and Lenore Weitzman' <www.acbr.com/biglie.htm> accessed 6 March 2025

Raz J, 'Multiculturalism: A Liberal Perspective', *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1995)

Raz J, 'Liberty and Trust' in R George (ed), *Natural Law, Liberalism and Mortality* (Oxford University Press 1996)

Razack S, 'Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages' (2004) 12 *Feminist Legal Studies* 129

Read Z, 'In Ceremonial Signing, Gov. Carney Renews Delaware's Vow against Child Marriages' *WHYY: NPR* (21 June 2018) <<https://whyy.org/articles/in-ceremonial-signing-gov-carney-renews-delawares-vow-against-child-marriages/>>

'Reagan, Ronald: Gubernatorial Papers, 1966-74: Press Unit' <<https://www.reaganlibrary.gov/archives/digitized-textual-material>>

Reiss F, 'Child Marriage in the United States: Prevalence and Implications' (2021) 69 Journal of Adolescent Health 58

Republican Party of Texas, '2024 Platforms and Resolutions' <https://texasgop.org/official-documents/#platform>

Republican Party of Texas, 'Platform and Resolutions as Amended and Adopted by the 2022 State Convention' <<https://texasgop.org/wp-content/uploads/2024/06/2022-RPT-Platform.pdf>>

Reynolds P, 'Betrothal and Consent', *How marriage became one of the sacraments: The sacramental theology of marriage from its medieval origins to the Council of Trent* (Cambridge University Press 2019)

Rich A, 'Compulsory Heterosexuality and Lesbian Existence' (1980) 15 Journal of Women's History 11

Richmond M and Hall F, *Child Marriages* (Russell Sage Foundation 1925)

Riess R, 'Man Convicted in 2008 Murders of His Daughters Sentenced to Life in Prison without Parole' [2022] CNN

Rivlin R, 'The Right to Divorce: Its Direction, and Why It Matters' (2013) 4 International Journal of the Jurisprudence of the Family 133

Robertson S, 'Making Right a Girl's Ruin', *Crimes against children: Sexual violence and legal culture in New York City, 1880-1960* (The University of North Carolina Press 2006)

Robinson R, 'Unequal Protection' (2016) 68 Stanford Law Review 151

Rodriguez B, 'Why Bills to End Spousal Rape Loopholes Hit Snags' *19th News* (20 May 2021) <<https://19thnews.org/2021/05/why-bills-to-end-spousal-rape-loopholes-hit-snags/>>

Romani L, 'Does Multiculturalism Pose a Problem for the Implementation of Individual Rights?: The Case of Forced Marriage in the Context of the United Kingdom'

Rothman D, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Routledge 2002)

Rouméas E, 'The Right to a Fair Exit' (2023) 22 Politics, Philosophy & Economics 160

Roy D, 'An Introduction to Forced Marriage in the South Asian Community of the United States' 57

Rude-Antoine E, 'Forced Marriages in Council of Europe Member States: A Comparative Study of Legislation and Political Initiatives' (Council of Europe 2005)

Rutherford A and others, 'Violence: A Glossary' (2007) 61 Journal of Epidemiol Community Health

Sabbe A and others, 'Forced Marriage: An Analysis of Legislation and Political Measures in Europe' (2014) 62 Crime Law and Social Change 171

Salkin R, 'The Cost of Love: Marriage Equality for Disabled LGBTQIA+ People' (National Organization for Women, 11 September 2024) <<https://now.org/blog/the-cost-of-love-marriage-equality-for-disabled-lgbtqia-people/>>

Samad Y, 'Forced Marriage among Men: An Unrecognized Problem' (2010) 30 Critical Social Policy 189

Samad Y and Eade J, 'Community Perceptions of Forced Marriage' (Foreign and Commonwealth Office 2002)

Sanger C, 'Legislating with Affect: Emotion and Legislative Law Making' (2013) 53 American Society for Political and Legal Philosophy 38

Scalia A and Garner B, 'Reading Law: The Interpretation of Legal Texts'

Schaber P, 'How Permissive Consent Works' (2020) 33 Wiley 117

Schaber P, 'The Volenti Maxim' (2020) 24 Journal of Ethics 79

Schulhofer S, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press 1998)

Scott E, 'Rational Decisionmaking About Marriage and Divorce' (1990) 76 Virginia Law Review 9

Scott S, 'Contractual Incapacity and the Americans With Disabilities Act' (2020) 124 Dickinson L Rev. 253

Scott S, 'Reasons for Divorce and Recollections of Premarital Intervention: Implications for Improving Relationship Education' (2013) 2 Couple Family Psychology 131

Scutt J, 'Human Rights "Arranged" Marriages and Family Law: Should Culture Override or Inform Fraud and Duress' (2014) 26 Denning Law Journal 62

Seiler N, 'Is Teen Marriage a Solution?' [2002] Center for Law and Social Policy

Shaniff E and Concannon B, *Approaches to Determine and Manage Sexual Consent Abilities for People with Cognitive Disabilities* (Interactive J Med Res 2022)

Shklar J, 'The Liberalism of Fear' in NL Rosenblum (ed), *Liberalism and the moral life* (Harvard University Press 1989)

Singer J, 'The Privatization of Family Law' (1992) 1992 Wisconsin Law Review 1443

Şişli Z, 'Child Brides or Child Labor in a Worst Form?' [2019] Journal of Labor and Society

Smith S, 'Barbarians within the Gates: Congressional Debates on Mormon Polygamy, 1850-1879' (2009) 51 Journal of Church and State 587

Sobik J, 'Behind Closed Doors- Child and Early Marriage as Slavery' [2015] Anti-Slavery International

Social Security Administration, 'Benefits For Children With Disabilities' (2025) No. 05-10026

Social Security Administration, 'State Emancipation Law Survey Results'
<https://secure.ssa.gov/apps10/public/pomsimages.nsf/gfx_num/G-GN_00502.085C1/%24File/G-GN_00502.085C1.pdf>

Solinger R, *Wake up Little Susie: Single Pregnancy and Race before Roe v. Wade* (Routledge 2016)

Spiecker B, De Ruyter D and Steutel J, 'Taking the Right to Exit Seriously' (2006) 4 Theory and Research in Education 313

Stamp K, *The Peculiar Institution: Slavery in the Ante-Bellum Society* (Vintage Books 1989)

Stearns M, 'Obergefell, Fisher, and the Inversion of the Tiers' 19 Journal of Constitutional Law 1043

Stein J, 'Early to Wed: Teenage Marriage in Postwar America' (2013) 6 The Journal of the History of Childhood and Youth 359

Stevenson B and Wolfers J, 'Bargaining in the Shadow of the Law: Divorce Laws and Family Distress' [2006] Quarterly Journal of Economics 267

Stobard E, 'Guidelines to the Police in Dealing with Cases of Forced Marriages' (Association of Chief Police Officers, Foreign and Commonwealth Office and Home Office 2002)

Stritof S, 'Covenant Marriage Statistics'
<https://web.archive.org/web/20141006131450/http://marriage.about.com/cs/covenantmarriage/a/covenant_3.htm> accessed 21 January 2025

Sunstein C, 'The Right to Marry' (2004) 76 University of Chicago Public Law & Legal Theory Working Paper

Swegman C, 'The Intersectionality of Forced Marriage with Other Forms of Abuse in the United States' (Tahirih Justice Center 2016)

Syrett N, 'Imagining Rural Sexuality in the Depression Era: Child Brides, Exploitation Film, and the Winstead-Johns Marriage' (American Studies Association Annual Meeting, Baltimore, MD, 25 November 2014)

Syrett N, *American Child Bride: A History of Minors and Marriage in the United States* (The University of North Carolina Press 2018)

Tadros V, 'Consent to Harm' in V Tadros, *Wrongs and Crimes* (Oxford University Press 2016)

Tahirih Justice Center, 'Ending Child Marriage in the United States: Progress, Lessons Learned, and Where We Go from Here' (6 November 2023) <https://www.tahirih.org/news/ending-child-marriage-in-the-united-states-progress-lessons-learned-and-where-we-go-from-here/>

Tahirih Justice Center, 'Forced Marriage in Immigrant Communities in the United States' (2011)

Tahirih Justice Center, 'National Consultation- Should Forced Marriage Be a Crime in the United States' (2016)

Tahirih Justice Center, 'Virginia Makes History as 12th State and First in the South to End Child Marriage' (2024) <https://www.tahirih.org/news/virginia-makes-history-as-12th-state-and-first-in-the-south-to-end-child-marriage/>

Talbott J, 'Child Marriage in the United States and Its Association with Mental Health in Women' (2013) 2013 Yearbook of Psychiatry and Applied Mental Health 220

Taylor R, *Exit Left: Markets and Mobility in Republican Thought* (Oxford University Press 2017)

Tebbe N and Widiss D, 'Equal Access and the Right to Marry' (2010) 158 University of Pennsylvania Law Review 1375

Temple Institute on Disabilities, 'Disability Rights Timeline' <<https://disabilities.temple.edu/resources/disability-rights-timeline>> accessed 10 February 2025

The Chicago Tribune, 'America Has Its Child Brides' (1937)

The Harris Firm, 'Annulment in Alabama' (<http://theharrisfirmllc.com/annulment-lawyer-in-alabama/>)

The National WWII Museum, 'Coming To America: The War Brides Act of 1945' (28 December 2020) <<https://www.nationalww2museum.org/war/articles/war-brides-act-1945>>

Thompson S, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45 Journal of Law and Society

TIME, 'Education: Exempt Bride' [1937]

Torres N and Villacampa C, 'Intervention with Victims of Forced Marriage' [2021] Women & Criminal Justice 1

Trickey E, "'Why Is Child Marriage Still Legal?': A Young Lawmaker Tackles a Hidden Problem' *Politico* (9 January 2022)

Tucker J, 'Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes' (1989) 7 Yale Law and Policy Review 20

Uddin B and Ahmed L, 'A Choice by Right: The Report of the Working Group on Forced Marriage' (Home Office 2000)

Uecker J and Stokes C, 'Early Marriage in the United States' (2008) 70 Journal of Marriage and Family 835

Unchained At Last, 'Unchained Tells U.N.: Early/Forced Marriage Is a U.S. Problem Too' (13 December 2013) <<https://www.unchainedatlast.org/12132013-%E2%80%A2unchained-tells-the-u-n-earlyforced-marriage-is-a-u-s-problem-too/>>

Unchained At Last, 'United States Child Marriage Problem' (2021)
 <<https://www.unchainedatlast.org/united-states-child-marriage-problem-study-findings-april-2021/>>

Unchained At Last, 'Forced/Arranged/Child Marriage' <<https://www.unchainedatlast.org/about-arranged-forced-marriage/>> accessed 21 February 2024

United Nations, 'Disability-Inclusive Language Guidelines'
<https://www.ungeneva.org/sites/default/files/2021-01/Disability-Inclusive-Language-Guidelines.pdf>

United Nations General Assembly, 'In-Depth Study on All Forms of Violence against Women: Report of the Secretary General' (2006) A/61/122/Add.1

University of New Hampshire Pierce School of Law, 'NH Family Law Research Guide: Divorce'
 <<https://law.unh.libguides.com/nhfamilylaw/divorce>> accessed 10 March 2025

Unseen, '7 Human Trafficking Facts and Myths You Need to Know' (21 July 2023)
<https://www.unseenuk.org/human-trafficking-facts-and-myths/>

US Census Bureau, 'States, Counties, and Statistically Equivalent Entities'
 <<https://www2.census.gov/geo/pdfs/reference/GARM/Ch4GARM.pdf>> accessed 13 March 2025

US Department of Justice, '1072. Special Considerations in Proving a Threat', CRM 1000-1499

US General Accounting Office, 'Report on Marriage Rights' (1997)

USCIS, 'Instructions for Form I-130, Petition for Alien Relative, and Form I-130A, Supplemental Information for Spouse Beneficiary' (2024) OMB No. 1615-0012

USCIS, 'Policy Manual: Volume 1- General Policies and Procedures Part A: Public Services- Chapter 1: Purpose and Background' (2025)

Van Roost K, Horn M and Koski A, 'Child Marriage or Statutory Rape? A Comparison of Law and Practice Across the United States' (2022) 70 Journal of Adolescent Health 58

Vandeever D, 'Coercion, Seduction, and Rights' (1977) 58 The Personalist 377

Vera A, 'Marital Rape Is No Longer Legal in Minnesota with New Law' *CNN* (3 May 2019)
 <<https://edition.cnn.com/2019/05/03/us/minnesota-marital-rape-repeal/index.html>>

Villacampa C and Torres N, 'Forced Marriage: What Do Professionals Know?' (2021) 67 International Journal of Law, Crime and Justice 1

Vlosky D and Monroe P, 'The Effective Dates of No-Fault Divorce Laws in the 50 States' (2002) 51 Family Relations 317

Wahi A and others, 'The Lived Experience of Child Marriage in the United States' (2019) 34 Social Work in Public Health 201

Wang LS, 'Of the Law, But Not Its Spirit: Immigration Marriage Fraud as Legal Fiction and Violence against Asian Immigrant Women' (2013) 3 University of California Irvine Law Review 1221

Warner E, 'Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls' (2011) 12 Journal of Gender, Social Policy & the Law 233

Weissbrodt D and Anti-Slavery International, 'Abolishing Slavery and Its Contemporary Forms' (Office of the United Nations High Commissioner for Human Rights 2002)

Weitzman L, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (Free Pr 1985)

Wertheimer A, *Exploitation* (Princeton University Press 1996)

West R, 'Sex, Law, and Consent' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010)

Wester P, 'Freedom and Coercion - Virtue Words and Vice Words' (1985) 3–4 Duke Law Journal 541

Wester P and Mangiafico J, 'The Criminal Defense of Duress: A Justification, Not an Excuse- And Why It Matters' (2003) 6 Buffalo Criminal Law Review 833

Whitehead B, *The Divorce Culture* (Alfred a Knopf Inc 1997)

Whyte W, 'A Slum Sex Code' (1943) 49 American Journal of Sociology 24

Wickham P, 'Conceptions of Idiocy in Colonial Massachusetts' (2002) 25 J Soc Hist 935

Willet B, 'There Is No Republican Plot to End No-Fault Divorce — but There Should Be' *Washington Examiner* (18 August 2023)

Williams R, 'The One and Only Substantive Due Process Clause' 120 Yale Law Journal 408

Wilson A, 'Forced Marriage Debate and the British State' 49 Race and Class 25

Wilson J, 'Lectures on Law' (1792)

Winkler, A, 'Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts' (2006) 59 Vanderbilt Law Review 793

Wiseman M, 'State Strategies for Welfare Reform: The Wisconsin Story' (1996) 15 Journal of Policy Analysis and Management 515

World Health Organization, 'World Report on Violence and Health' (2002)

Wortman M, 'What Qualifies for an Annulment in Missouri?', (2022)
<<https://www.mwortmanlaw.com/2022/12/what-qualifies-for-an-annulment-in-missouri/>>

Wright R, 'How to Do Away With Coercion In the Law' 15 Washington University Jurisprudence Review 1

Yanow D, *Conducting Interpretive Policy Analysis* (Sage 2011)

Yardukul G and Korteweg A, 'Gender Equality and Immigrant Integration: Honor Killing and Forced Marriage Debates in the Netherlands, Germany, and Britain' (2013) 41 Women's Studies International Forum 204

Zola I, 'Toward Independent Living: Goals and Dilemmas', *Independent Living for Physically Disabled People* (iUniverse 2001)

Case Law

Abigail Alliance for Better Access to Developmental Drugs v von Eschenbach (2008) 552 US 1159 (US Supreme Court)

Adkins v Children's Hospital (1923) 261 US 525 (US Supreme Court)

Allen v Allen (1915) 95 Atl 363 (New Jersey)

Allgeyer v Louisiana (1897) 165 US 578 (US Supreme Court)

Alter v Alter (1937) 294 NY Supp 195 (New York Appellate Division)

Anderson v Loper (1996) 689 So 2d 118 (Alabama Civil Appellate Court)

Anderson v Morrow (2004) 371 F3d 1027 (9th Circuit)

Andrus v Andrus (1982) Ohio Appellate Court L-80-322

Anon v Anon (1937) 7 NYLJ 814 (New York Superior Court)

August v August (1937) 1 NYLJ 1436 (New York Superior Court)

Baker v Baker (1859) 13 Cal 87 (California)

Bark v Immigration and Naturalization Service (1975) 511 F2d 1200 (United States Court of Appeals, Ninth Circuit)

Beckley v Beckley (1904) 115 Ill App 27 (Illinois)

Bertrand v Arcueil (1849) 4 La Ann 430 (Louisiana)

Bishop v Bishop (1970) 308 NYS 2d 998 (New York Superior Court)

Blair v Blair (2004) 147 SW3d 882 (Missouri Court of Appeals, Western District)

Blatt v Manhattan Medical Group (1987) 519 NYS2d 973 (New York Appellate Division)

Boddie v Connecticut (1971) 401 US 371 (US Supreme Court)

Bolling v Sharpe (1954) 347 US 497 (US Supreme Court)

Bowers v Hardwick (1986) 478 US 186 (US Supreme Court)

Brown v Board of Education of Topeka (1954) 347 US 483 (US Supreme Court)

Brown v United Mo Bank (1996) F3d 382 (8th Circuit)

Buck v Bell (1927) 272 US 200 (US Supreme Court)

C v C (1914) 148 NW 865 (Wisconsin)

Califano v Jobst (1977) 434 US 47 (US Supreme Court)

Campbell v Moore (1939) 189 SE 2d 497 (South Carolina)

Carey v Population Services International (1977) 431 US 678 (US Supreme Court)

Carricato v Carricato (1964) 384 SW 2d 85 (Kentucky Court of Appeals)

Carricato v Carricato 384 SW2d 85 (Kentucky Court of Appeals)

Carris v Carris (1873) 24 NJ Eq 516 (New Jersey)

Cervone v Cervone (1935) 280 NY Supp 159 (New York Superior Court)

Chan v Bell (1978) 464 F Supp 124 (US District Court for the District of Columbia)

Church of Lukumi Babalu Aye, Inc v City of Hialeah (1993) 508 US 520 (US Supreme Court)

Citizens United v Federal Election Commission (2010) 558 US 310 (US Supreme Court)

City of Cleburne v Cleburne Living Ctr (1985) 473 US 432 (US Supreme Court)

Clarke v Clarke (1860) 11 Abb Pr 228 (New York)

Cleveland Board of Education v LaFleur [1974] US Supreme Court 414, US 632

Cleveland Board of Education v Loudermill (1985) 470 US 532 (US Supreme Court)

Commonwealth v Berkowitz (1994) 641 A2d 1164 (Pennsylvania)

Connally v General Construction Co (1926) 269 US 385 (US Supreme Court)

Cooper v Aaron (1958) 358 US 1 (US Supreme Court)

Cote v Murphy (1894) 159 Pa 420 (Pennsylvania)

Coulter v Hendricks (1995) 918 SW2d 424 (Tennessee Court of Appeals)

County of San Luis Obispo v Nathaniel J (1996) 50 Cal App 4th 842 (California Court of Appeals)

Craig v Boren (1976) 429 US 190 (US Supreme Court)

Crane v Crane (1901) 49 Atl 734 (New Jersey)

Cumming v State (1896) 99 Ga 002 (Georgia)

Cummington v Belchertown (1889) 21 NE 436 (Massachusetts)

Cummins v Redman (1977) 251 NW2d 343 (Minnesota)

Dabaghian v Civiletti, (1979) 607 F2d 868 (9th Circuit)

Daubert v Mosley (1971) 487 P2d 353 (Oklahoma)

Denver Area Education Telecommunications Consortium Inc v FCC (1996) 517 US 727 (US Supreme Court)

Deshaney v Winnebago County Dep't of Social Services (1989) 489 US 189 (US Supreme Court)

DeVries v DeVries (1915) 194 Ill App 4 (Illinois Court of Appeals)

DiLorenzo v Di Lorenzo (1903) 67 NE 63 (New York Court of Appeals)

Dobbs v Jackson Women's Health Organization (2022) 597 US 215 (US Supreme Court)

Duncan v State of Louisiana (1968) 391 US 145 (US Supreme Court)

Eisenstadt v Baird (1972) 405 US 438 (US Supreme Court)

Erickson v Erickson (1944) 48 NYS 2d 588 (New York Superior Court)

Farmers Bank Trust Co v Public Service Co of Indiana (1936) 13 F Supp 548 (US District Court for the Western District of Kentucky)

Federal Communications Commission v Fox Television Stations, Inc (2012) 567 US 239 (US Supreme Court)

Federal Communications Commission v Beach Communications Inc (1993) 508 US 307 (US Supreme Court)

Fontana v Fontana (1912) 77 Misc 135 (New York)

Forbis v Forbis (1955) 274 SW2d 800 (Illinois, Springfield Court of Appeals)

French v French (1980) 599 SW2d 40 (Missouri Court of Appeals)

Frisbie v United States (1895) 157 US 160 (US Supreme Court)

Gatto v Gatto (1919) 106 Atl 493 (New Hampshire)

Gerwitz v Gerwitz (1945) 66 NYS 2d 327 (New York Appellate Division)

Gideon v Wainwright (1963) 372 US 335 (US Supreme Court)

Gregory v Ashcroft (1991) 501 US 452 (US Supreme Court)

Griffen v Griffen (1924) 122 Misc 837 (New York)

Griswold v Connecticut (1965) 381 US 479 (US Supreme Court)

Grutter v Bollinger (2003) 539 US 306 (US Supreme Court)

Guthrie v Guthrie (2015) 455 SW3d 844 (Arkansas Court of Appeals)

Hall v United States (1875) 92 US 27 (US Supreme Court)

Hanson v Hanson (1934) 191 NE 673 (Massachusetts)

Harrell v Harrell (1897) 42 SW 1040 (Texas Court of Appeals)

Herrman v Herrman (1916) 93 Misc 315 (New York)

Hull v Hull (1915) 191 Ill App 307 (Illinois)

In re Gault (1967) 387 US (US Supreme Court)

In re Marriage of Baumgartner (2010) 930 NE2d 1024 (Illinois)

In re Marriage of Greenway (2013) 217 Cal App 4th 628 (California Court of Appeals)

In re Marriage of Meagher & Maleki (2005) 31 Cal Rptr 3d 663 (California Court of Appeals)

In re Montgomery (1988) CA8709-123 (Ohio Court of Appeals)

In re Smith (1972) 295 A2d 238 (Maryland)

In re the Marriage of Joy Lynn Farr, and Larry Allen Farr (2010) No. 09CA0238 (Colorado Court of Appeals)

Jacobson v Jacobson (1923) 202 NY Supp 96 (New York Appellate Division)

Jakar v Jakar (1920) 102 SE 337 (South Carolina)

Jay Burns Baking v Bryan (1924) 264 US 504 (US Supreme Court)

Kawabata v Kwabata (1922) 189 NW 237 (North Dakota)

Kingsley v Kingsley (1993) 623 So 2d 780 (Florida District Court of Appeals)

Kirkpatrick v Eight Judicial District Court (2003) 119 Nev 66 (Nevada)

Korematsu v United States (1944) 323 US 214 (US Supreme Court)

Kramer v Union Free School District No 15 (1969) 395 US 621 (US Supreme Court)

Lapides v Lapides (1930) 171 NE 911 (New York)

Lawrence v Texas (2003) 539 US 558 (US Supreme Court)

Lenoir v Lenoir (1904) 24 App DC 160 (District of Columbia)

Levinson v Levinson (1939) 4 NYLJ 1305 (New York Superior Court)

Lewis v Lewis (1890) 46 NW 323 (Minnesota)

Lochner v New York (1905) 198 US 45 (US Supreme Court)

Loving v Virginia (1967) 388 US (US Supreme Court)

Lutwak v United States (1953) 344 US 604 (US Supreme Court)

Lyon v Lyon (1907) 82 NE 850 (Illinois)

Madsen v Women's Health Center, Inc (1994) 512 US 743 (US Supreme Court)

Marshall v Marshall (1931) 300 Pac 816 (California)

Maslow v Maslow (1953) 255 P2d 65 (California Court of Appeals)

Maynard v Hill (1888) 125 US 190 (US Supreme Court)

McCord v Goode (2010) 308 SW3d 409 (Texas Court of Appeals)

McElroy v Matthews (1953) 263 SW2d 1 (Missouri)

Meister v Moore (1877) 96 US 76 (US Supreme Court)

Meyer v Meyer (1875) 49 How Or 311 (New York)

Meyer v Meyer (1879) 7 Oh Dec 637 (Ohio)

Meyer v Nebraska (1923) 262 US 390 (US Supreme Court)

Michael M v Sonoma Country Superior Court (1981) 450 US 464 (US Supreme Court)

Mississippi University for Women v Hogan (1982) 458 US 718 (US Supreme Court)

MLB v SLJ (1996) 519 US 102 (US Supreme Court)

Morgan v Morgan (1988) WL130340 (Court of Appeals of Tennessee)

Mormon Church [or Late Corp of LDS] v US (1889) 136 US 1 (US Supreme Court)

Morrill v Nightingale (1892) 93 Cal 452 (California)

Morris v Goodwin (2016) 230 Md App 395 (Maryland Appellate Court)

Morris v Morris (1940) 13 Atl 2d 603 (Delaware)

Morrissey v Brewer (1972) 408 US 471 (US Supreme Court)

Moss v Moss (1897) 263 P (England)

Musser v Utah (1948) 333 US 95 (US Supreme Court)

Mutter v Mutter (1906) 124 Am St Rep 381 (Kentucky)

Nadra v Nadra (1890) NW 44 1046 (Michigan)

Nebbia v New York (1934) 291 US 502 (US Supreme Court)

Nerini v Nerini (1943) 11 Conn Supp 361 (Connecticut Superior Court)

New State Ice v Liebmann (1932) 285 US 262 (US Supreme Court)

Niesen v Niesen (1968) 157 NW2d 660 (Wisconsin)

Obergefell v Hodges (2015) 576 US 644 (US Supreme Court)

O'Connell v O'Connell (1922) 194 NY Supp 265 (New York Appellate Division)

Ortelere v Teacher's Retirement Board (1969) 25 NY 2d 196 (New York Court of Appeals)

Osborne v Osborne (1937) 191 Atl 783 (New Jersey)

People v Thompson (2006) 142 Cal App 4th 1426 (California Court of Appeals)

Pierce v Society of Sisters (1925) 268 US 510 (US Supreme Court)

Planned Parenthood of Southeastern Pennsylvania v Casey (1992) 505 US 833 (US Supreme Court)

Powell v Pennsylvania (1888) 127 US 678 (US Supreme Court)

Purdy v Purdy (2003) 578 SE2d 30 (South Carolina Court of Appeals)

Quigg v Quigg (1903) 42 Misc 48 (New York)

Reese v State (2004) 869 So2d 1225 (Florida District Court of Appeals)

Republican Party of Minnesota v White (2002) 536 US 765 (US Supreme Court)

Reynolds v Reynolds (1862) 3 Allen 605 (Massachusetts)

Reynolds v US (1878) 98 US 145 (US Supreme Court)

Richardson v Richardson (1923) 140 NE 73 (Massachusetts)

Ritter v ritter (1839) 5 Blackf 81 (Indiana)

Roberts v United States Jaycees (1984) 468 US 609 (US Supreme Court)

Robertson v Roth (1925) 204 NE 329 (Minnesota)

Roe v Wade (1973) 410 US 113 (US Supreme Court)

Rogers v Rogers (1928) 151 Miss 644 (Mississippi)

Romer v Evans (1996) 517 US 190 (US Supreme Court)

Ryder v Ryder (1894) 28 Atl 1029 (Vermont)

Sable Communications v FCC (1989) 492 US 115 (US Supreme Court)

Saltzberg v Saltzberg (1931) 153 Atl 605 (New Jersey)

Schaeffer v Schaeffer (1913) 160 App Div 48 (New York)

Schibi v Schibi (1949) 69 A2d 831 (Connecticut)

School Board of Nassau County Florida v Arline (1987) 480 US 273 (US Supreme Court)

Shapiro v Thompson (1969) 394 US 618 (US Supreme Court)

Shonfeld v Shonfeld (1933) 184 NE 60 (New York)

Sickles v Carson (1875) 26 NJ Eq 440 (New Jersey)

Skinner v Oklahoma (1942) 316 US 535 (US Supreme Court)

Sosna v Iowa (1975) 419 US 393 (US Supreme Court)

Sparrow v Demonico (2012) 960 NE2d 296 (Massachusetts)

State ex Rel Hermesmann v Seyer (1993) 252 Kan 646 (Kansas)

State in Interest of MTS (1992) 129 NJ 422 (New Jersey)

State v Brownlee (1892) 84 Iowa 473 (Iowa)

State v Cushing (1897) 17 Wash 544 (Washington)

State v Schlichter (1815) 263 Mo 516 (Missouri)

States v States (1893) NJ Eq 195 (New Jersey)

Steele v Steele (1895) 29 SW 17 (Kentucky)

Stokes v Immigration and Naturalization Services (1975) 393 F Supp 24 (US District Court for the Southern District of New York)

Surganoca v Holder (2010) 612 F3d 901 (7th Circuit)

Svenson v Svenson (1904) 70 NE 120 (New York)

Tinker v Des Moines Independent Community School (1969) 393 US 503 (US Supreme Court)

Travers v Reinhardt (1907) 205 US 423 (US Supreme Court)

Trimble v Gordon (1977) 430 US 762 (US Supreme Court)

Turner v Safley (1987) 482 US 107 (US Supreme Court)

Twigg v Mays (1993) 330624 WestLaw (Florida Circuit Court)

US v Bailey (1980) 444 US 394 (US Supreme Court)

US v Boomer (1978) 571 F2d 543 (10th Circuit)

US v Bryan (1979) 591 F2d 1161 (5th Circuit)

US v Chapman (1972) 455 F2d 746 (5th Circuit)

US v Diaz (2013) 736 F3d 1143 (8th Circuit)

US v Dysart (1983) 705 F2s 1247 (10th Circuit)

US v Gonzales (2005) 407 F3s 118 (2nd Circuit)

US v Hunaity (2020) New Jersey District Court Criminal Record 1:18-cr-00723

US v Marino 148 F Supp 75 (District Court for the Northern District of Illinois)

US v Michelson (1977) 559 F2d 567 (9th Circuit)

US v Orellana-Blanco (2002) 294 F3d 1143 (9th Circuit)

US v Tagalicud (1996) 84 F3d 1180 (9th Circuit)

US v Virginia (1996) 518 US 515 (US Supreme Court)

US v Willis (1994) 38 F3d 170 (5th Circuit)

US v Windsor (2013) 570 US 744 (US Supreme Court)

US v Zahida Aman, et al (2022) US District Court, Eastern District of Virginia Criminal Action 3:19-cr-85

Varney v Varney (1881) 8 NW 739 (Wisconsin)

Vileta v Vileta (1942) 128 Pac 2d 376 (California Court of Appeals)

Wadoz v United Nat Indem Co (1957) 80 NW2d 262 (Wisconsin)

Ward v Rock Against Racism (1989) 491 US 781 (US Supreme Court)

West Coast Hotel Co v Parrish (1937) 300 US 379 (US Supreme Court)

Wier v Still (1870) 31 Ia 107 (Iowa)

Williams v Williams (1911) 71 Misc 590 (New York)

Williams v Williams (1922) 118 Atl 638 (Delaware)

Williams v Williams (1939) 11 NYS 2d 611 (New York)

Williams v Williams (2006) 939 So2d 1154 (District Court of Appeals of Florida)

Williamson v Lee Optical Co (1955) 348 US 483 (US Supreme Court)

Williamson v Williamson (1910) 34 App DC 536 (District of Columbia)

Wolfe v Wolfe (1979) 389 NE2d 1143 (Illinois)

Woodward v Heichelbeck (1925) 128 Atl 169 (New Jersey)

Zablocki v Redhail, (1978) 434 US 374 (US Supreme Court)

Legislative Hearings

Congressional Record, House of Representatives, 30 July 1996.

Congressional Record, House of Representatives, Hearing on H27015, 1 September 1986.

Connecticut Assembly Judiciary Committee, Hearing on HB 5442, 2 March 2017.

Florida House Civil Justice & Claims Subcommittee, Hearing on HB335, 8 November 2017.

Florida House Judiciary Committee, Hearing on HB355, 1 February 2018.

Georgia House of Representatives, Hearing on HB228, 2 February 2019.

Hawaii Senate Judiciary Committee, Hearing on SB279, 17 February 2021

Maine House Judiciary Committee, Hearing on LD622, 9 June 2021.

Maryland Senate Judiciary Committee, Hearing on S670, 8 April 2018.

Maryland Assembly Judiciary Committee, Hearing on HB83, 27 January 2022.

Montana House Judiciary Committee, Hearing on HB533, 21 February 2019.

New Hampshire House Judiciary Committee, Hearing on HB1587, 16 January 2018.

Oklahoma House of Representatives, Hearing on HB3873, 11 March 2020.

South Carolina Senate Judiciary Committee, Hearing on S0591, 5 May 2021.

Texas House Committee on Juvenile Justice & Family Issues, Hearing on 15 March 2021.

Statutes

International

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956

Temporary Slavery Commission 1924

United Nations Declaration of Human Rights 1948

UK Forced Marriage (Civil Protection) Act 2007

UK Anti-social Behaviour, Crime and Policing Act 2014

Federal/National

Americans with Disabilities Act 1994, 42 U.S.C. 12102

An Act to Regulate the Immigration of Aliens into the United States (Immigration Act) 1907, 34 Stat. 898

Child Abuse Prevention and Treatment Act 1974, Public Law No: 93-247

Fair Labor and Standards Act 1938, 29 U.S.C. § 203

Immigration and Nationality Act 1952, 8 U.S.C. § 1158

Immigration Marriage Fraud Amendments 1990, 8 U.S.C. § 1186a, Supp II

Page Act 1875, Sect. 141, 18 Stat. 477

Personal Responsibility and Work Opportunity Reconciliation Act 1996, Public Law No. 104 - 193

War Brides 1945, 59 Stat. 659

Unpassed Congressional Bills

International Protecting Girls by Preventing Child Marriage Act, S.987, introduced 6 May 2009

Marriage Equality for Disabled Adults Act, H.R 6640, introduced 6 December 2023

Supplemental Security Income Restoration Act, H.R. 7138, introduced 30 January 2024

National Regulations

Federal Rules of Civil Procedure (FRCP)

Federal Rules of Evidence (FRE)

Uniform Commercial Code (UCC)

Model Penal Code (MPC)

State

Alabama

Alabama Code (AL Code)

§ 13A-6-60
§ 13A-6-61
§ 13A-6-62
§ 13A-6-67
§ 13A-6-69.1
§ 26-13-1
§ 30-1-4
§ 30-1-5
§ 30-02-6
§ 30-2-8.1

Alaska

Alaska Statutes (AK Stat.)

§ 09.55.590
§ 11.41.434
§ 11.41.436
§ 11.41.438
§ 11.41.440
§ 11.41.445
§ 25.05.011
§ 25.05.171
§ 25.20.020
§ 25.24.030
§ 25.24.200

Arizona

Arizona Revised Code (A.R.S)

§ 12-2451
§ 13-1405
§ 13-1407
§ 13-1410
§ 25-102
§ 25-301
§ 25-329
§ 44-132

Arkansas

Arkansas Code (AR Code)

§ 5-14-103
§ 5-14-125
§ 5-14-126
§ 5-14-127
§ 9-11-102
§ 9-11-103

§ 9-11-209
§ 9-12-201
§ 9-12-301
§ 9-27-362
§ 25-503(O)

California

California Family Code (Cal. Fam. Code)

§ 301
§ 302
§ 303
§ 304
§ 2210
§ 2339
§ 7002
§ 7120

California Penal Code (C.P.C)

§ 261.5
§ 265

Colorado

Colorado Revised Statutes (C.R.S)

§ 14-2-106
§ 14-2-108
§ 14-10-111
§ 14-10-115
§ 18-3-402
§ 18-3-405
§ 18-3-409
§ 19-1-103

Connecticut

Connecticut General Statutes (C.G.S)

§ 46b-20a
§ 46b-29
§ 46b-40
§ 46b-67
§ 46b-150
§ 53a-65
§ 53a-67
§ 53a-70
§ 53a-71
§ 53a-73

Delaware

Delaware Code (D. Code)

Title 11

§ 5-762
§ 5-768
§ 5-769
§ 5-770
§ 5-771
§ 5-772
§ 5-773

Title 13

§ 1-123
§ 110
§ 1506
§ 1507

Florida

Florida Statutes (FL Stat.)

§ 61.19)
§ 741.04
§ 743.01
§ 743.015
§ 787.06
§ 794.05
§ 800.04

Georgia

Georgia Code (GA Code)

§ 15-11-721
§ 15-11-201
§ 16-6-1
§ 16-6-3
§ 19-3-2
§ 19-3-36
§ 19-5-3

Hawaii

Hawaii Revised Statutes (Haw. Rev. Stat.)

§ 572-1
§ 572-2
§ 572-9
§ 572-10
§ 577-25
§ 580-1
§ 580-21
§ 707-730
§ 707-732

Idaho

Idaho Code Annotated Statutes (I.C.A.S)

§ 15-1-201

§ 18-6101
§ 18-6107
§ 32-202
§ 32-501
§ 32-701

Illinois

Illinois Compiled Statutes (I.L.C.S)

§ 5/11-1.10
§ 5/11-1.30
§ 5/11-1.40
§ 5/11-1.50
§ 5/11-1.60
§ 5/203
§ 5/208
§ 5/301
§ 5/401
§ 30/3-2
§ 30/4

Indiana

Indiana Code (Ind. Code)

§ 31-11-1-4
§ 31-11-1-5
§ 31-11-1-7
§ 31-11-9-2
§ 31-11-9-3
§ 31-11-10-1
§ 31-15-2-2
§ 31-16-6-6
§ 31-34-20-6
§ 31-37-19-27
§ 35-42-4-3
§ 35-42-4-9
§ 35-42-3.5-1

Iowa

Iowa Code

§ 232C.1
§ 598.29
§ 598.19
§ 589.3
§ 595.2
§ 595.3
§ 598.29
§ 599.1
§ 709.3
§ 709.4

Kansas

Kansas Statutes (Kan. Stat.)

§ 21-5503
§ 21-5506
§ 21-5507
§ 23-2505
§ 23-2702
§ 23-2708
§ 38-101
§ 38-109

Kentucky

Kentucky Revised Statutes (K.R.S)

§ 402.020
§ 402.205
§ 402.210
§ 403.120
§ 403.170
§ 510.035
§ 510.040
§ 510.050
§ 510.060
§ 510.110
§ 510.120
§ 510.130
§ 403.170

Louisiana

Louisiana Children's Code (LA Ch. C.)

§1545
§1547
§1548
§1549

Louisiana Title IV (LA Title IV)

Chapter 2 Art 95

Louisiana Civil Code (LA Civ. Code)

Art. 103.1
Art. 366
Art. 367

Louisiana Statutes (LA Stat.)

§ 14:42
§ 14:80
§ 14:80.1

Maine

Maine Revised Statutes (M.R.S)

Title 15

§ 3506-A

Title 17-A

§ 253

§ 254

§ 255-A

§ 260

Title 19-A

§ 652

§ 752

Maryland

Maryland Family Law Code (M.F.L.C)

§ 2-301

§ 2-301

§ 2-406

§ 7-103

Title 17-A

§ 253

§ 254

§ 255-A

§ 260

Maryland Criminal Law Code (MD Crim.
Law Code)

§ 3-304

§ 3-307

§ 3-308

§ 3-318

§ 11-303

Massachusetts

Massachusetts General Laws (M.G.L.)

Title 207

§ 7

§ 16

§ 24

§ 25

§ 33A

§ 34

§ 27

Title 208

§ 21(WT)

Title 231

§ 85(P)

Title 265

§ 23
Title 272
§ 1

Michigan

Michigan Compiled Laws (M.C.L.)

§ 551.201
§ 551.103
§ 551.51
§ 552.37
§ 552.39
§ 552.9
§ 722.4(2)
§ 750.520
§ 750.520
§ 750.5201

Minnesota

Minnesota Statutes (Minn. Stat.)

§ 517.02
§ 517.03
§ 518.02
§ 609.265
§ 609.341
§ 609.342
§ 609.345

Mississippi

Mississippi Code (Miss. Code)

§ 41-41-203
§ 93-1-5
§ 93-5-2
§ 93-7-3
§ 97-3-1
§ 97-3-65
§ 97-3-95
§ 97-3-99
§ 93-11-65

Missouri

Missouri Revised Statutes (MO Rev. Stat.)

§ 451.020
§ 451.090
§ 452.305
§ 452.340
§ 566.023
§ 566.032
§ 566.034

§ 566.071

Montana

Montana Code (Mont. Code)

§ 40-1-202
§ 40-1-213
§ 40-1-402
§ 41-1-501
§ 40-26.04.010
§ 40-4-108
§ 45-5-501
§ 45-5-502
§ 45-5-503

Nebraska

Nebraska Revised Statutes (Neb. Rev. Stat.)

§ 28-319
§ 28-319.01
§ 28-320.01
§ 42-102
§ 42-103
§ 42-105
§ 42-107
§ 42-118
§ 43-2101
§ 43-4802
§ 42-363
§ 45-5-501
§ 45-5-502
§ 45-5-503

Nevada

Nevada Revised Statutes (Nev. Rev. Stat.)

§ 122.020
§ 122.025
§ 122A.100
§ 125.340
§ 129.080
§ 200.364
§ 200.366
§ 200.373
§ 201.300

New Hampshire

New Hampshire Revised Statutes (NH Rev. Stat.)

§ 21-B:1
§ 21-B:3

§ 457:4
§ 457:5
§ 457:6
§ 457:7
§ 457:8
§ 458-1-3
§ 458:12
§ 632-A:2
§ 632-A:3
§ 632-A:4

New Jersey

New Jersey Revised Statutes (NJ Rev. Stat.)
§ 2A:34-1
§ 2C:14-2
§ 2C:14-3
§ 2C:14-5
§ 37:1-6
§ 37:1-9

New Mexico

New Mexico Statutes (NM Stat.)
§ 30-9-11
§ 32A-21-3
§ 40
§ 40-1-6

New York

New York Domestic Relations Code (NY
Dom. Rel. Code)
§7
§ 15-a

New York Penal Law (NY Penal L.)

§ 130.10
§ 130.25
§ 130.30
§ 130.35
§ 130.55
§ 130.60
§ 130.65

North Carolina

North Carolina General Statutes (NC Gen.
Stat.)
§ 7B-3500
§ 7B-3509
§ 14-27.7

§ 50-6
§ 51-2
§ 51-2.1
§ 51-3

North Dakota

North Dakota Century Code (N.D.C.C.)
§ 12.1-20-01
§ 12.1-20-03
§ 12.1-20-07
§ 14-03-02
§ 14-03-17
§ 14-03-18
§ 14-04-01
§ 14-10-07
§ 50-25.2-01

Ohio

Ohio Revised Code (Ohio Rev. Code)
§ 2907.02
§ 2907.04
§ 2907.05
§ 2907.06
§ 3101.01
§ 3101.02
§ 3101.04
§ 3101.05
§ 3105
§ 3105.31
§ 3101.06

Ohio Rules of Juvenile Procedure
Rule 42

Oklahoma

Oklahoma Statutes (Okla. Stat.)
Title 10
§ 91
Title 21
§ 1111
§ 1117
§ 1118
§ 1119
Title 43
§ 3
§ 5
§ 101
§ 123

Oregon
Oregon Revised Statutes (Or. Rev. Stat.)

§ 106.010
§ 106.050
§ 106.060
§ 107.015
§ 109.520
§ 163.315
§ 163.345
§ 163.355
§ 163.365
§ 163.375
§ 163.415
§ 163.435
§ 419B.558

Pennsylvania
Pennsylvania Consolidated Statutes (Penn.
Con. Stat.)

Title 18
§ 3121
Title 23
§ 1304
§ 3305
§ 3301

Rhode Island
Rhode Island General Laws (RI Gen. Laws)

§ 11-37-2
§ 11-37-6
§ 11-37-8.1
§ 11-37-8.3
§ 15-1-5
§ 15-2-14
§ 15-3.1-2
§ 15-5-1

South Carolina
South Carolina Code (SC Code)

§ 16-3-651
§ 16-3-655
§ 16-3-658
§ 20-1-10
§ 20-1-100
§ 20-1-250
§ 20-1-260
§ 20-1-530

§ 44-41-10
§ 59-112-10

South Dakota
South Dakota Codified Laws (SD Cod. L.)

§ 22-22-1
§ 22-22-7
§ 22-22-7.3
§ 25-1-9
§ 25-1-10.1
§ 25-1-13
§ 25-3-2
§ 25-3-5
§ 25-3-6
§ 25-4-34
§ 25-5-24
§ 25-5-26

Tennessee
Tennessee Code (Tenn. Code)

§ 29-31-101
§ 36-3-105
§ 36-3-109
§ 36-4-101
§ 39-13-501
§ 39-13-506
§ 39-13-522

Texas
Texas Family Code (Tex. Fam. Code)

§ 2.101
§ 6.108
§ 6.107
§ 6.702
§ 31.001
§ 101.003

Texas Penal Code (Tex. Penal Code)

§ 22.011
§ 22.021

Utah
Utah Code (Utah Code)

§ 15-2-1
§ 30-1-9
§ 30-1-17.1
§ 76-5-401
§ 76-5-401.2
§ 76-5-402.1

§ 76-5-407
§ 78A-6-803
§ 80-7-103
§ 81-4-402

Vermont

Vermont Statutes (V.S)

Title 12

§ 7151

Title 13

§ 3252

§ 3253

§ 5142

Title 15

§ 512

§ 554

Virginia

Virginia Code (VA Code)

§ 16.1-331

§ 18.2-61

§ 18.2-63

§ 18.2-371

§ 18.2-355

§ 20-45.1

§ 20-48

§ 20-89.1

§ 20-91

Washington

Washington Revised Code (Wash. Rev.
Code)

§ 9A.44.073

§ 9A.44.076

§ 9A.44.079

§ 9A.44.083

§ 9A.44.086

§ 9A.44.089

§ 13.64.010

§ 26.04.010

§ 26.04.130

§ 26.04.210

West Virginia

West Virginia Code (WV Code)

§ 48-2-301

§ 48-3-105

§ 48-5-202

§ 49-4-115

§ 49-7-27

§ 61-2-14

§ 61-8B-3

§ 61-8B-5

§ 61-8B-7

§ 61-8B-9

Wisconsin

Wisconsin Statutes (Wis. Stat.)

§ 765.02

§ 765.11

§ 767.313

§ 767.335

§ 948.01

§ 948.02

§ 948.09

§ 948.093

Wyoming

Wyoming Statutes (WY Stat.)

§ 6-2-314

§ 6-2-315

§ 6-2-316

§ 6-2-317

§ 14-1-201

§ 14-1-203

§ 20-1-102

§ 20-2-101