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AGE MATTERS: CLASS, FAMILY FORMATION, AND INEQUALITY

June Carbone*

Age matters. It matters legally—in giving consent for a contract, a marriage or enlistment in the armed forces. It matters practically—for renting a car, securing favorable insurance rates, and choosing a date. It certainly matters biologically—we are on the cusp of understating the age-related changes in emotion and cognition. And, I will argue in this article, it matters socially. Age, because of the interaction of physical changes with social structures, may be an important component of inequality.

This article will begin with a conundrum. The age of legal majority, that is, of presumed independence, has long been eighteen, rising to twenty-one for riskier activities such as the consumption of alcohol. Moreover, the age of legal maturity, whether eighteen or twenty-one, corresponds to the point where young adults have often made the transition from parental guidance to the assumption of adult responsibilities. Yet, new biological research suggests that the full age of cognitive maturity, that is, the point where patterns indicate fully developed adult reasoning and judgment may not occur until the mid-twenties.

These findings help explain the risk-taking that often accompanies early adulthood. They vindicate insurance findings that older drivers, i.e., those over twenty-five, are better safety risks. They correspond to the criminological literature that finds that criminal behavior peaks in late adolescence. They also parallel observations that marriage after twenty-five produces fewer divorces—and fewer children. Moreover, this new research is coming on-line at

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the same time as an important transformation of the entry into adulthood.

Marriage and parenthood once served as important markers of the assumption of adult roles. Women went from their parents' home to their husband's, often closely supervised in each. For men, the pathways could be more varied. In some societies, financial readiness was indispensable to the ability to marry; in others, marriage precipitated entry into the labor force. In both cases, though, family formation depended on the transition to adulthood.¹ Social support, supervision, and in many cases coercion, shepherded the transition, assisting fragile families in acquiring stable foundations, and helping them navigate the difficult early years that preceded full adult maturity.

The new family model, what I have called elsewhere, "the new middle class morality," postpones marriage and childbearing until well after entry into adulthood, and does so for both men and women. In a striking study, Sara McLanahan reports that between 1970 and 2000, the average age of first birth for the upper quarter of American women rose from twenty-six to thirty-two.² It remained the same for everyone else. For that upper quartile, which corresponds to the college educated portion of the population, non-marital birth rates are below 10%, divorce rates have fallen back to the levels of the sixties, paternal involvement in childrearing has doubled, and maternal workforce participation has become the norm.³ For this new elite, the picture of family life is a rosy one—two active parents with more income and time to invest in their children.

For the rest of the country, family life is a marker of inequality. McLanahan, comparing the bottom quartile to the top quartile, finds that for the bottom group, non-marital birth rates are close to 50%, divorce rates have reached a

1. Late-age marriages, though rare, are not unprecedented. Seventeenth-century England was remarkable for the relatively late ages of marriage of both men and women, and the high percentage of people who did not marry at all. Producing such results, however, required a high degree of supervision of young adults and intense socialization into appropriate norms and roles. For a more comprehensive account, see LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800*, at 401-02, 408 (1979).

2. Sara McLanahan, *Diverging Destinies: How Children are Faring After the Second Demographic Transformation*, 41 *DEMOGRAPHY* 607, 609 (2004).

3. *Id.* at 608-14 figs.1, 2, 3, 4 & 5.

plateau at historically high levels double that of the top group, fewer mothers are in the labor market, and fewer fathers spend time with their children.⁴

I will argue in this article that age—and the failure of law and social policy to take age of family formation into account—is an important factor in the growing family-based inequality. The secret to the stable marriages of the middle class is family formation *after* emotional maturity and financial independence. The supervised and subsidized pathway to adulthood occurs *before* family formation through education, assistance in achieving the right financial footing, and internalization of values that promote autonomy and responsibility. The deregulation of intimate relationships and tolerance for varied family forms builds on the construction of a stable foundation, permitting the realization of traditional family values with a minimum of external coercion. The ability to avoid early or unplanned childbearing is critical to the result.

The new model then doubly disadvantages the poor. They disproportionately lack access to the new, approved pathways to adulthood that postpone childrearing, and include post-secondary education, subsidized internships, contraception, and (if necessary) abortion.⁵ At the same time, the societal structure and support that guided more traditional family formation (e.g., high school romances and unintended pregnancies that lead to early marriage) have atrophied.⁶ Indeed, given the tensions inherent in the transition to new normative understandings underlying the change, all of the choices realistically available to the poorest Americans may incur moral condemnation.⁷ The result

4. *Id.*

5. See discussion *infra* Parts II.C, III.B, III.C.

6. To the extent young marriages endured, they have historically done so because the resulting family was embedded in a social and cultural milieu that guided the assumption of adult roles *within* the structure provided by marriage. These roles included male employment, driven by families' dependence on the resulting income, and female socialization into childrearing, with the low point in women's bargaining power coming with the presence of young children in the household. For an in-depth examination of these forces, see JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 123-29 (2000).

7. As I will explain below, neither marriage to an impecunious (if not violent or criminal) mate, nor a non-marital birth, nor abortion, is likely to command consensus support as a solution to a poor woman's improvident

makes family—and the corresponding factor of age—a locus for exacerbating inequality.

This article will examine the emergence of these class-based differences through the lens of the new biological studies on brain maturity. Accordingly, it will begin with a section that summarizes the research results suggesting that decision-making after the mid-twenties may be qualitatively different from the decisions of those in their teens and early twenties.⁸ Second, it will link the new research on brain development to class-based changes in family formation. Third, it will consider the societal support for the different family models by examining the fight over welfare reform, the changing picture of accessibility to contraception and abortion, the workplace support for parents, and the often hidden class subtext of debates over family values. It will conclude by sketching the implications for a legal research agenda attentive to the implications of age and class.

While all of the legal and policy analysis in this paper could be made without reference to neuroscience or brain development, I believe that examining these issues in light of the intersection of age and class adds a new dimension to the institutional changes exacerbating inequality.

I. 25: THE NEW AGE OF MATURITY?

If eighteen and twenty-one have long been the legal ages of majority, what are the biological and social markers of adulthood? The two need not coincide, and indeed need not be uniform historically or culturally.

Research, for example, on risk-taking, mortality, and

pregnancy. In Congress, the language of welfare reform was the language of marriage with its corresponding condemnation of non-marital births. For the proponents of the new middle class morality, however, the problem was not the birth outside of marriage, but the birth in improvident circumstances at all. The solution for the latter would, of course, have been more-effective access to contraception and abortion at a time when the marriage promotion efforts were counseling abstinence, denying public funding for abortion, and making access more difficult. See an extended discussion of these issues *infra* Part II.B.

8. This research first received legal attention in the context of the juvenile death penalty, and it has been the subject of insightful analysis about teen decision-making by Jennifer Drobac. See Jennifer Ann Drobac, "Developing Capacity": Adolescent "Consent" at Work, at Law, and in the Sciences of the Mind, 10 UC DAVIS J. JUV. L. & POL'Y 1 (2006). This article, however, will focus not on individual competence in decision-making, but rather institutional support for the transition to adulthood.

other behavior often groups the ages from ten to twenty-four as a focus of inquiry.⁹ The census subdivides those years into ten to nineteen as adolescents, and fifteen to twenty-four as youth.¹⁰ When researchers ask the question, however, what signifies the entry into adulthood, young Americans are inclined to reject both chronological age, and the assumption of adult roles such as full time employment or marriage. Instead, they choose individual factors as the top three criteria: accepting responsibility for oneself, making independent decisions, and becoming financially independent.¹¹ The first two involve not just experience, but capacity, and the development of that capacity has been the subject of increasing scientific research.

This examination of neuroscience brain development focuses on the development of the prefrontal cortex, the center for advanced cognitive reasoning, and recognition that the brain may not reach full adult development until the mid-twenties. Cognitive neuroscientists, in particular, have attempted "to link cognitive processes, such as memory, attention and decision-making, with activity in the brain."¹² These efforts examine the development of brain structure and operation. While they are still a long way from charting the precise relationships between brain developments and judgment, neuroscientists have established that, contrary to earlier belief that the brain changed little after early childhood, brain structure and function continue to change

9. See, e.g., Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3 OHIO ST. J. CRIM. L. 321, 322 (2006); Ctrs. for Disease Control and Prevention, *Mortality Trends and Leading Causes of Death Among Adolescents and Young Adults -- United States, 1979-1988*, 42 MORBIDITY AND MORTALITY WEEKLY REP. 459, 459 (1993), available at <http://cdc.gov/mmwr/pdf/wk/mm4224.pdf>.

10. See Peter Xenos, *Events Information and the Life Course Framework in Young Adult Reproductive Health (YARH) Survey Studies of Adolescent Risk 3* (East-West Ctr., Working Paper No. 108-1, 2001), available at <http://www2.eastwestcenter.org/ayarr2001/Previews/EventsInfo/108-01.pdf>.

11. Jeffrey Jensen Arnett & Nancy L. Galambos, *Culture and Conceptions of Adulthood*, in *Exploring Cultural Conceptions of the Transition to Adulthood*, 100 NEW DIRECTIONS FOR CHILD AND ADOLESCENT DEVELOPMENT 91, 91-92 (Jeffrey Jensen Arnett & Nancy L. Galambos eds., 2003).

12. Catherine Sebastian, *The Second Decade: What Can We Do About the Adolescent Brain?* 1 OPTICON 1826 1 (2007), http://www.ucl.ac.uk/cics/opticon1826/Volume1Issue2/TableOfContents/VfPLIFE_Teenagers.pdf.

into the twenties.¹³

A. Brain Structure: The Ratio of White Matter to Gray Matter

The brain consists of about 100 billion nerve cells.¹⁴ The cell bodies comprise the brain's "gray matter."¹⁵ Protrusions from cell bodies, known as "axons" and "dendrites," interconnect the neurons. A fatty substance called "myelin," which acts as an insulator, coats the axons, allowing the more efficient transmission of electrical signals. These insulated fibers bind together to form the brain's "white matter."¹⁶ Staci Gruber and Deborah Yurgelun-Todd explain that "white matter can be understood as the parts of the brain responsible for information transmission, whereas gray matter is responsible for information processing."¹⁷

While the volume of white matter in the brain increases linearly and continues to increase into midlife, gray matter expands significantly in early adolescence and is then pruned back during post-adolescence.¹⁸ "Pruning" involves the thinning of gray matter, eliminating the excess connections between brain cells. The specific form the pruning takes reflects experience; the neuronal process becomes more efficient at the tasks to which the brain has become

13. *Id.* at 1. Elizabeth S. Scott & Laurence Steinberg, Essay, *Blaming Youth*, 81 TEX. L. REV. 799, 811-13 (2003), suggest that adolescents may have the cognitive capacity for adult decision-making, but lack the skill and experience necessary for reliable judgments in stressful situations. The assertion relies not on neuroscience findings, but on small scale laboratory experiments largely involving middle-class students that test cognitive judgment. They further agree, on the basis of psychological research, that psychosocial development proceeds more slowly than cognitive ability, *id.* at 813, and that a stable sense of identity does not emerge until early adulthood. *Id.* at 812.

14. Sebastian, *supra* note 12, at 1.

15. *Id.*

16. *Id.*

17. Gruber & Yurgelun-Todd, *supra* note 9, at 324.

18. Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in the Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 HUM. BRAIN MAPPING 766, 767 (2005), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/112162278/ABSTRACT>. Gray matter also increases dramatically during late fetal development and after birth, and is pruned back starting around the age of two. Paul Arshagouni, *"But I'm an Adult Now . . . Sort of:" Adolescent Consent in Health Care Decision-Making and the Adolescent Brain*, 9 J. HEALTH CARE L. & POL'Y 315, 347-48 (2006).

accustomed to performing.¹⁹ "Myelination," or the increased coating of axons with white matter, further improves transmission, making the connections quicker and more reliable.²⁰ Researchers hypothesize that reductions in gray matter reflect increased myelination, which in turn produce age-related improvements in cognitive processing.²¹ Gruber and Yurgelun-Todd accordingly posit that the ratio of white-to-gray matter volume corresponds with brain maturation.²²

Studies of brain development show that brain volume, which reflects the combination of white and gray matter, continues to increase until around age twenty, and that the ratio of white to gray matter continues to change at least into the mid-twenties, with later development for males than females.²³ Moreover, this research indicates that the development of different parts of the brain occurs at different times. The last parts of the brain to mature are the frontal lobes, regions of the brain associated with planning, attention, and social interactions.²⁴

19. See Inside the Teenage Brain, Interview on Frontline with Jay Giedd, Neuroscientist, Nat'l Inst. of Mental Health, <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html> (last visited Mar. 17, 2008).

20. See MICHAEL S. GAZZANIGA, RICHARD B. IVRY & GEORGE R. MANGUN, COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND 27-28, 41-42 (1998).

21. Gruber & Yurgelun-Todd, *supra* note 9, at 324.

22. *Id.* at 325.

23. Lucy C. Ferguson, Comment, *The Implications of Developmental Cognitive Research on "Evolving Standards of Decency" and the Imposition of the Death Penalty on Juveniles*, 54 AM. U. L. REV. 441, 454 (2004); see also Sebastian, *supra* note 12, at 1 ("[B]oth white and grey matter continue to develop well into our twenties."); Bennett & Baird, *supra* note 18, at 2 (noting that MRI studies show that white matter continues to increase into mid-life, while gray matter peaks in early adolescence and declines into early adulthood); Gruber & Yurgelun-Todd, *supra* note 9, at 325 (discussing that greater volume of white matter and reduced gray matter correlates with more efficient and rapid information processing and verbal ability typical of adult maturation). Gray matter, however, peaks in volume at the beginning of adolescence. Arshagouni, *supra* note 18, at 348. The relationship between white/gray matter development and sex differences in maturation is not well understood, however. See, e.g., Michael D. De Bellis et al., *Sex Differences in Brain Maturation During Childhood and Adolescence*, 11 CEREBRAL CORTEX 552 (2001). Men and women vary significantly in the ratio between white matter and gray matter, and men experience more dramatic changes than women during adolescence and early adulthood. Researchers speculate that the differences are attributable to sex-based hormonal differences, which begin earlier in women because of the earlier average age of puberty. *Id.* at 555.

24. See Sebastian, *supra* note 12, at 1. Cf. Bennett and Baird, *supra* note 18, at 767 ("Spatially, the dorsal, medial, and lateral areas of prefrontal cortex and

B. Brain Function: The Pre-frontal Cortex, Brain Integration, and Judgment

While scientists cannot yet link the structural changes in the brain to specific behavior, they emphasize that the last regions to develop control the most sophisticated brain processes.²⁵ Furthermore, the most profound differences between adult and adolescent behavior involve decision-making, or executive level processing.²⁶ Catherine Sebastian observes, for example, that teenagers and adults both perform the complex visual calculation necessary to determine when a car will enter an intersection in similar ways.²⁷ They are more likely to differ, however, in how they reach a decision about whether to attempt to beat the approaching car into the intersection or to wait.²⁸

Such judgments involve not just overall brain volume, but also the relationships among different parts of the brain. Positron Emission Tomography, or PET scans, measure baseline glucose metabolism in different parts of the brain. These PET scan studies show that cortical metabolic activity reaches stable, adult-like activity only in the mid-twenties.²⁹

More recent studies indicate that the cerebellum develops almost as late as the frontal cortex,³⁰ and that it is involved in any skill involving higher thought, including music, mathematics, philosophy, and decision-making.³¹

posterior areas of temporal cortex have been shown to develop last.”). *See also* Gruber & Yurgelun-Todd, *supra* note 9, at 324 (stating that the largest maturational changes observed between twelve and sixteen and twenty-three and thirty occurred in certain regions of the frontal lobes). Sebastian, unlike the others, also emphasizes changes in the parietal lobes, but those changes tend to be complete by mid-adolescence. Arshagouni, *supra* note 18, at 349.

25. Sebastian, *supra* note 12, at 2; *see also* Cass R. Sunstein, *Adolescent Risk Taking and Social Meaning: A Commentary* 2-4 (John M. Olin Law & Econ. Working Paper No. 386, 2d Series, 2008), available at <http://www.law.uchicago.edu/Lawecon/index.html> (synthesizing different commentaries on brain maturation, but noting later development of the areas of the brain associated with mature judgment).

26. Sebastian, *supra* note 12, at 2.

27. *Id.*

28. *Id.*

29. Bennett & Baird, *supra* note 18 (citing P. Van Bogaert et al., *Regional Changes in Glucose Metabolism During Brain Development from the Age of 6 Years*, 8 NEUROIMAGE 62 (1998)).

30. Arshagouni, *supra* note 18, at 349 (finding that the cerebellum does not reach full development until the early twenties).

31. *Id.*

Nonetheless, the most dramatic studies involve the prefrontal cortex. This research emphasizes not just that the area of the brain associated with reason and judgment develops later than the rest of the brain, but that the pathways between the pre-frontal cortex and the emotional centers of the brain develop later still.³² What was once thought to be a bright-line distinction between reason and emotion is rapidly dissolving.

Abigail Baird emphasizes that reason does not in fact work very well in the absence of emotion, and reason in turn makes the emotional parts of the brain more accurate.³³ An early study, for example, showed adult and adolescent subjects fearful faces and asked them to identify the emotions. The adults displayed significant activation of the prefrontal cortex in performing the task, while the adolescents showed no activation in that region. Conversely, the teenagers responded with greater activation of the amygdala than did the adults, suggesting that, for adults, the activity in the pre-frontal cortex may have suppressed the response of the amygdala.³⁴ Further, studies show similar results with "happy faces:" this time indicating a correlation between age and the anterior cingulate in performing the activity.³⁵ The anterior cingulate is involved in decision-making, evaluation of outcomes, and inhibition, and both of these studies indicate that, among the adolescents, the activity levels in the prefrontal cortex increased with age.³⁶

A further study in this series demonstrated that the use of different parts of the brain affected overall accuracy. Shown a series of facial expressions, the adults correctly identified fear every time while the teens did so only about 50% of the time. Accurate responses corresponded with activation of the pre-frontal cortex, while the less accurate respondents relied more on use of the amygdala.³⁷ Researchers believe that greater reliance on the amygdala

32. Bennett & Baird, *supra* note 18, at 9.

33. Abigail A. Baird, *Adolescent Moral Reasoning: The Integration of Emotion and Cognition*, MORAL PSYCHOL. (forthcoming), available at <http://theteenbrain.com/about/publications/pdfs/2006-Baird-Morality.pdf> (last visited Apr. 2, 2008).

34. Gruber & Yurgelun-Todd, *supra* note 9, at 328.

35. *Id.* at 328-29.

36. *Id.*

37. Arshagouni, *supra* note 18, at 350.

corresponds to more emotional, erratic, and impulsive decision-making.³⁸ It may also explain teens' greater difficulty in interpreting emotional signals.³⁹

Other work examines the ventromedial pre-frontal cortex, which is thought to be involved in the evaluation of rewards. The Iowa Gambling Test considers the role of this part of the brain by giving subjects four decks of cards. Two decks offer the possibility of high rewards and heavy losses. The other two decks offer smaller rewards and losses. The decks are stacked so that the two decks offering smaller rewards and losses produce the greatest gains.⁴⁰ Normal adults, after trying all four decks, gradually shift to the decks producing the greatest yields.⁴¹ Adults with damage to the ventromedial PFC do not.⁴² When a group ranging in age from six to twenty-five performed the task, all but the youngest gradually shifted to the "good decks," but those in their early teens, i.e., from ten to fifteen, took the longest to do so.⁴³

These studies involve different areas of the brain that may come on-line at different points in the transition from adolescence to adulthood.⁴⁴ They are part of increasing efforts to map higher level executive functioning, the ability to suppress impulsive or risky behavior,⁴⁵ the influence of

38. *Id.*

39. Ferguson, *supra* note 23, at 455 n.75.

40. Sebastian, *supra* note 12, at 2.

41. *Id.*

42. *Id.*

43. Eveline A. Crone & Maurits W. Van der Molen, *Developmental Changes in Real Life Decision Making: Performance on a Gambling Task Previously Shown to Depend on the Ventromedial Prefrontal Cortex*, 25 DEVELOPMENTAL NEUROPSYCHOL. 251, 252-53 (2004).

44. The Iowa Gambling Task, for example, identified major differences between ten- to fifteen-year-olds and older teens, while the face recognition exercise showed more continuous changes into the twenties. Given the small sample sizes in most of these studies, it is difficult to tell whether the changes reflect a continuous developmental process that levels off in the twenties or a lumpier process of jumps in different parts of brain development at different times. See Sebastian, *supra* note 12, at 2.

45. A simple study that asked adolescents to inhibit a natural response (pushing a button unless an X appeared) found that the adolescents, who performed with the same accuracy as adults, activated more of the prefrontal cortex to accomplish the same task as the adults. This suggests that adolescents find it either more difficult or less efficient to inhibit the response. Leanne Tamm, Vinod Menon & Allan L. Reiss, *Maturation of Brain Function Associated with Response Inhibition*, 41 J. AM. ACAD. OF CHILD AND

peers,⁴⁶ the accuracy of social judgments,⁴⁷ and the ability to plan and evaluate options. One of the more comprehensive studies examined college students over the age of eighteen and found continuing development in five different brain regions associated with conscious awareness of emotion, the integration of sensory information into higher order processes, and formulation of strategies.⁴⁸ Dr. Baird, one of the study's authors, concludes: "One striking difference regarding the development of the prefrontal cortex relative to other cortical areas is the continuation of synaptic pruning into young adulthood. This decrease in synaptic density during adolescence coincides with the emergence of newly entwined cognitive and emotional phenomena."⁴⁹ She agrees with Dr. Ruben Gur, Director of the University of Pennsylvania Medical Center, that strong and growing evidence shows that the brain continues to mature into the early twenties "in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics."⁵⁰

C. Psycho-Social Development and The Maturation of Judgment

Law professor Elizabeth Scott and psychologist Laurence Steinberg, in examining juvenile crime and behavior,

ADOLESCENT PSYCHIATRY 1231, 1231-33 (2002).

46. See, e.g., Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision-Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 629 (2005) (finding in a driving simulation study that teens took more risks when driving with peers than when driving alone).

47. One study, for example, asked adults and adolescents to make decisions about physical causality (e.g., consequences of a storm) versus intentional causality (what a person might choose to do). Sarah-Jayne Blakemore et al., *Adolescent Development of the Neural Circuitry for Thinking about Intentions*, 2 SOC. COGNITIVE AND AFFECTIVE NEUROSCI. 130, 131 (2007). When asked to think about intentional causality, the teens activated a larger portion of their medial PFCs than did the adults, while the adults activated a different brain area. *Id.* at 133. Sebastian speculates that the differences reflect the adults' greater maturity and efficiency in making social judgments. Sebastian, *supra* note 12, at 3.

48. Bennett & Baird, *supra* note 18, at 9.

49. Baird, *supra* note 33, at 5.

50. Arshagouni, *supra* note 18, at 351 (quoting Am. Bar Ass'n Juvenile Justice Ctr., *Adolescence, Brain Development, and Legal Culpability*, CRUEL AND UNUSUAL PUNISHMENT: THE JUVENILE DEATH PENALTY 3 (2004)).

distinguish between “cognitive” capacity and “psycho-social” development.⁵¹ Their research draws on more traditional psychological studies rather than on developments in neuroscience, but their insights parallel the newer findings on brain development.⁵² Indeed, Scott and Steinberg draw virtually the same distinctions that Sebastian did in summarizing neuroscience findings above.⁵³ They observe that by mid-adolescence teens resemble adults in their cognitive capacity; that is, their ability to learn through education and experience, their information-processing skills, such as attention, short- and long-term memory, and organization, and their overall ability to understand and reason.⁵⁴ They would agree that teens enjoy nearly the same capacity as adults to learn to calculate the speed and trajectory of a car approaching an intersection. What develops more slowly than cognitive ability is “psycho-social” development; that is, the contextual judgment to determine whether it is worth the risk to attempt to enter the intersection before the approaching car. That judgment may involve weighing the small chance of an accident against long-term catastrophic consequences, the reaction of peers present in the car versus the impact on loved ones who are not physically present, and experience—those who drive regularly or have witnessed an accident may respond differently from those who have not.⁵⁵

51. Scott & Steinberg, *supra* note 13, at 812-13.

52. *Id.* at 816.

53. See Gruber & Yurgelun-Todd, *supra* note 9, at 324.

54. Scott & Steinberg, *supra* note 13, at 812; *see also id.* at n.54 (stating that “the key advances during this period are gains in deductive reasoning, the ability to think about hypothetical situations, the ability to think simultaneously in multiple dimensions, the ability to think abstractly, and the ability to think about the process of thinking (‘metacognition’)”); *see also* JOHN H. FLAVELL, PATRICIA H. MILLER & SCOTT A. MILLER, COGNITIVE DEVELOPMENT (Prentice Hall 1993) (1963) (outlining Piaget’s theory and updating it based on new data); BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (Ann Parsons & Stanley Milgram trans., 1958); JEAN PIAGET, GENETIC EPISTEMOLOGY (Eleanor Duckworth trans., 1970); ROBERT S. SIEGLER, CHILDREN’S THINKING (Prentice-Hall 1991) (1986).

55. Sunstein, *supra* note 25, at 8 (explaining the role of experience in making judgments both faster and more accurate). Experience, of course, can make individuals overly cautious. Someone who has experienced an accident may have a strong association between the decision to enter an intersection and a visceral sense of fear that may interfere with efficient decision-making.

Scott and Sternberg emphasize four factors critical to mature judgment that continue to change into early adulthood: peer orientation, attitudes toward and perception of risk, temporal perspective, and capacity for self-management.⁵⁶ While researchers have yet to chart the exact relationship between brain function and decision-making, these factors are associated with the later developing portions of the brain.⁵⁷

Today, these factors are also becoming the markers of entry into adulthood. As military studies have long demonstrated, youth has its advantages. The pruning of the gray matter of the brain allows development to be custom-tailored to a particular individual's experiences.⁵⁸ The result is an "apprenticeship" that literally directs the formation of the neural pathways that facilitate learning and lay the foundation for the assumption of adult responsibilities.

The first step in this transition is the change in focus from parent-child interactions to peer relationships. Baird explains that this occurs in part because children entering adolescence are being biologically primed for reproduction, and reproduction involves much greater sensitivity to peer interactions.⁵⁹ The approval or disapproval of other teens

Moreover, the social meaning of a given act may also influence its emotional valence. Sunstein gives the example of the different social images associated with smoking in African-American versus white communities that produce significantly lower smoking rates among African-American than white teens. *Id.* at 10-11.

56. Scott & Steinberg, *supra* note 13, at 813.

57. For a particularly good summary of the relationship between brain development and moral decision-making, see Baird, *supra* note 33, at 7, which argues that it is the synthesis of visceral and cognitive information that permits the development of mature judgment. She explains that a critical change in moral judgment is the ability not just to perceive the difference between right and wrong, but to experience visceral feelings associated with the thought of performing wrongful acts. Baird further observes that a brain region with a demonstrated significant relationship between age and volume (which in turn is associated with the increase in white matter) is the anterior cingulate cortex, an area known for its prominent role in the mediation and control of emotional, attentional, motivational, social, and cognitive behaviors. She suggests that this area may be particularly critical to the integration of somatic and cognitive factors essential to development of the moral habits she describes. *Id.* at 6-7.

58. *Id.* at 4-5.

59. *Id.* at 12. Baird further notes that important components of peer sensitivity are the "imaginary audience," or the sense that others are always watching and evaluating, and the "personal fable" or the "belief that the self is unique, invulnerable, and omnipotent." *Id.* at 9; see also Sunstein, *supra* note

becomes a primary concern, and individual ability to discern and interpret social cues increases rapidly with the change in orientation.⁶⁰ Peer reactions then shape in turn the individual's perception of the acceptability of a course of conduct.

The second stage involves the internationalization of learned reactions, a step that requires greater integration of the cognitive and emotional centers in the brain. Young adults learn to anticipate the reaction of others before they occur, and to recognize their own reactions to a possible choice of action. With this greater self-awareness comes capacity for the formation of self-conscious *emotions* as well as cognitive thought.⁶¹ The settings in which the transition occurs reinforce the particular pathways that connect thought and emotion. Thus, military services might prime reactions to the assertions of authority that are subtly different from those of students who spend the same formative years in college.⁶²

The final step connects these internal states to societal norms, allowing mature, independent judgment. This last stage allows the individual to experience empathy with persons unknown as well as known and to allow the identification not merely with an immediate peer group, but the larger society and more abstract norms.⁶³ The mature individual is also better prepared to exercise conscious choice in the selection of appropriate objectives, and the individual decisions necessary to realize them.

While this process is a developmental one, different individuals may experience it at somewhat different ages depending on predisposition and experience. Moreover, the very flexibility of the process makes the individual's particular pathway to adulthood an important component of the brain's final architecture. Researchers have no precise map of these developments; indeed, the relationship between

25, at 4 (discussing research that suggests that risk-taking may be adaptive because it corresponds to the period when young adults typically leave home in search of mates).

60. Baird, *supra* note 33, at 12.

61. *Id.* at 13.

62. See, e.g., Sunstein, *supra* note 25, at 10-11 (discussing the different teen smoking rates in African-American and white communities).

63. *Id.*

a specific neural state and any particular action remains speculative.⁶⁴ Nonetheless, this research generates new questions— what decision-making processes work most effectively in late adolescence—and new appreciation for traditional insights such as the volatility of and the role of peer influence in teen behavior.⁶⁵ It also suggests that control of late adolescence, and societal prescription of the experiences that shape socialization, may be an important component of the determination of the type of society in which the young adult is trained to function.

II. 25: THE NEW AGE OF READINESS FOR PARENTHOOD?

Fascinating as this research may be, the temptation is to ask: so what? Even if researchers further establish distinct patterns of adolescent and early adult brain development, it does not necessarily change either the issues we entrust to teen decisions,⁶⁶ or their responsibility for the results.⁶⁷

64. Brain research provides convincing evidence of brain function when damage to a particular part of the brain corresponds to an inability to perform certain tasks. *See, e.g.*, DAVID J. LINDEN, *THE ACCIDENTAL MIND: HOW BRAIN EVOLUTION HAS GIVEN US LOVE, MEMORY, DREAMS AND GOD* 14, 17 (2007). MRI studies show a correlation between particular areas of the brain and various activities and establish a particular causal relationship between the activity in any area of the brain and particular behaviors. The research on more complex activities, such as judgment, necessarily involves an element of speculation about the implications of more testable factors such as MRI results that show activation of different parts of the brain at different ages.

65. Indeed, Naomi Cahn and I have argued with respect to behavioral biology more broadly that the most important legal implications involve the generation of new questions. The *answers* and the corresponding policy prescriptions will need to stand on more traditional considerations of efficacy and justice, not just on their consonance with the brain research. *See* June Carbone & Naomi Cahn, *The Biological Basis of Commitment: Does One Size Fit All?*, 25 *WOMEN'S RTS. L. REP.* 223, 224 (2004).

66. Even these issues do not turn on any simple-minded conclusion that teens are incapable of reaching appropriate decisions. Indeed, a leading analysis by Jennifer Drobac argues that teens should enjoy more, not less, autonomy in decision-making that affects them. The key to their conclusions lies in the *context* of the decisions. Teen-doctor interactions, for example, whether they involve tests for sexually-transmitted diseases or access to contraception, involve professional guidance. Indeed, the principal impact of greater teen autonomy, especially in cases of hostile or strained parental relationships, may in fact be entry into a structured relationship (doctor-patient) rather than evasion of formal restrictions through teen networks (peer-supplied condoms).

67. The Supreme Court's decision to ban the juvenile death penalty, for example, though almost certainly influenced by research showing that teens

Instead, Naomi Cahn and I have argued elsewhere that a better understanding of the biological bases of behavior does not stand in isolation, but rather helps explain the *patterns* that underlie social institutions. For any society, patterns of family formation will be an important social determinant. Today, those patterns are driven to a significant degree by a change in the age of family formation.

A. *The New Pathways to Adulthood*

The intersection of family formation with mature brain development has varied over time. Baird suggests that the first stage of puberty involves sexual maturity and the shift in focus from parents to peers is an understandable first step in preparation for reproduction. In most societies, marriage—and the structure marriage brings—follows relatively quickly after full sexual maturity, at least for women. Some societies, for example, arrange marriages for prepubescent girls.⁶⁸ Their entry into adult roles then takes place under their husband's supervision. Most societies, of course, wait at least until the bride is physically of age, but any society that values virginity closely supervises the period between puberty and marriage.⁶⁹ Moreover, for women whose adult roles are closely tied to childbearing and housekeeping, why wait? Women's fertility—and presumably her attractiveness to potential mates, peaks by the early twenties.⁷⁰ Women's socialization into adulthood has

might fully exhibit mature judgment and the ability to appreciate the implications of their action, stood independently on the Court's interpretation of the Eighth Amendment's prohibition of cruel and unusual punishment. See *Roper v. Simons*, 543 U.S. 551, 553 (2005).

68. See, e.g., Judith E. Tucker, *Ties that Bound: Women and Family in Eighteenth- and Nineteenth-Century Nablus*, in *WOMEN IN MIDDLE EAST HISTORY: SHIFTING BOUNDARIES IN SEX AND GENDER* 233, 238 (Nikki R. Keddie & Beth Baron eds., 1993) (finding that nineteen of 107 marriage contracts recorded in Nablus in the eighteenth century involved prepubescent girls); HANS A. BAER, MERRILL SINGER & IDA SUSER, *MEDICAL ANTHROPOLOGY AND THE WORLD SYSTEM* 288 (2003) (describing the practice of arranging marriages of prepubescent girls to boys a few years older in certain communities studied).

69. See, e.g., STONE, *supra* note 1, at 401-02, 408 (1979) (commenting on the relationship between class and female chastity and the extraordinary levels of sexual repression necessary to limit births and contain them within marriage); David J. Hacker, *Rethinking the "Early" Decline of Marital Fertility in the United States*, 40 *DEMOGRAPHY* 605, 606-07 (2003) (also noting fertility levels in England and comparing them to circumstances in the U.S.).

70. Class not only affects young women's social readiness for intimate

typically taken place within the context of courtship and marriage—experiences that place a premium on stereotypical gender roles.

The picture for men is more varied. Males typically mature later than women and marry later.⁷¹ In societies that emphasize financial independence as a precondition for marriage, many men marry late or not at all.⁷² English society in the seventeenth century carried these patterns to extraordinary lengths. Average marriage ages rose to the mid-twenties for women and substantially later for men, with a fifth of the population not marrying at all.⁷³ For those who marry that late in life, habits and character are forged in contexts other than courtship and reproduction. In many periods, classes, or societies, however, both men and women marry soon after sexual maturity. Akerloff, Yellen, and Katz, for example, describe courtship among working class San Franciscans in the early sixties as “sexual” and “brief.” They

relationships, but factors such as the absence of a father in the home may affect the age of menarche. See, e.g., Sabine Hoier, *Father Absence and Age at Menarche: A Test for Evolutionary Models*, 14 HUM. NATURE 209 (2003).

71. The two, of course, need not be directly related. Girls enter puberty at earlier ages than boys, but the relationship between the hormonal changes that begin in early adolescence and the continuing brain development that continues into the twenties is not well understood. See De Bellis et al., *supra* note 23, at 46-47 (asserting, in a 2001 study, that it is the first effort to assess gender differences in brain maturation associated with the relative growth of gray and white matter). Differences in the assumption of adult responsibilities, on the other hand, vary greatly with the expectations of the particular society. For an extreme example, see Michael Slackman, *Stifled, Egypt's Young Turn to Islamic Fervor*, N.Y. TIMES, Feb. 17, 2007, available at <http://www.nytimes.com> (search “Slackman, Michael, stifled” and follow hyperlink “GENERATION FAITHFUL: Dreams Stifled, Egypt's Youth Turn to Islamic Fervor”) (finding that the average age of marriage for men in Egypt has risen to thirty-one because so many prospective grooms cannot raise the money necessary for the increasingly expensive weddings customary in Egyptian society).

72. Elizabeth Fussell & Frank F. Furstenberg, Jr., *The Transition to Adulthood During the Twentieth Century: Race, Nativity, and Gender*, in ON THE FRONTIER OF ADULTHOOD: THEORY, RESEARCH, AND PUBLIC POLICY 29 (Frank F. Furstenberg, Jr., Ruben G. Rumbaut, & Richard A. Settersten, Jr. eds., 2004) (noting that for men of Western European origin, stable employment was a precursor to the ability to form a family and that in the first half of the twentieth century such employment was generally attainable by age twenty, but no longer is today).

73. E. A. Wrigley & R.S. Schofield, *THE POPULATION HISTORY OF ENGLAND 1541-1871*, at 162 (Cambridge Univ. Press 1981) (1989); see also J. David Hacker, *Rethinking the "Early" Decline of Marital Fertility in the United States*, 40 DEMOGRAPHY 605, 620 (2003).

describe a young man, explaining, "If a girl gets pregnant, you married her. There wasn't no choice. So I married her."⁷⁴ Marriage in such circumstances then brought substantial pressure for the man to support his family, and the woman to stay with him so long as he did.⁷⁵ For these couples, the improvident pregnancy triggered the assumption of adult responsibilities the couple might have preferred to postpone.⁷⁶

Over the last half-century, patterns of American family formation have been transformed. The fifties set the stage as the as-yet-unheralded beginning of the sexual revolution and the changes from a manufacturing to information economy collided. Stephanie Coontz observes that "[a]t the end of the 1940's, all the trends characterizing the rest of the twentieth century suddenly reversed themselves. For the first time in more than one hundred years, the age of marriage and motherhood fell, divorce rates declined, and women's degree of educational parity with men dropped sharply."⁷⁷ By 1960, the number of brides pregnant at the altar rose to 30%, a level last seen in 1800.⁷⁸

At the same time, however, heavy manufacturing—and relatively high paying blue-collar positions—began to move overseas, and the demand for a more educated workforce grew.⁷⁹ The expansion of the service sector brought growth in

74. George Akerloff, Janet Yellin & Michael Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q. J. ECON. 277, 279 (1996).

75. See, e.g., MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 28 (1993).

76. See, e.g., Frank F. Furstenberg, Jr., Ruben G. Rumbaut, & Richard A. Settersten, Jr., *Emerging Themes and New Directions*, in *ON THE FRONTIER OF ADULTHOOD: THEORY, RESEARCH, AND PUBLIC POLICY* 3, *supra* note 72, at 4-5 (noting that in the 1950s, close to half of all women were married by the age of twenty, many of them already pregnant by the time that they entered matrimony; thus, adulthood occurred at the end of a relatively brief period of adolescence).

77. STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 25 (1992).

78. LINDA HIRSHMAN & JANE LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 92 (1998).

79. For example, during the same period disparity in earnings between the highly educated and those with low levels of schooling widened. In the late seventies male college graduates' earnings were 33% higher than those of high school graduates; by the end of the eighties this advantage had increased to 53% and the returns to education and skills continued to increase during the nineties. Mary Corcoran & Jordan Matsudaira, *Is it Getting Harder to Get Ahead? Economic Attainment in Early Adulthood for Two Cohorts*, in *ON THE FRONTIER OF ADULTHOOD: THEORY, RESEARCH, AND PUBLIC POLICY* 356, *supra*

the positions traditionally held by women—office workers, health care providers, restaurant employees, etc.—and the more general expansion of the white collar ranks increased the returns to investment in women's education and workforce participation.⁸⁰ Something had to give if women were simultaneously marrying younger, having more children, dropping out of school more readily, and being more heavily recruited into the family-unfriendly paid labor market.⁸¹

The first things to give way were the families of the fifties. Younger marriages and shotgun weddings correlate with higher divorce rates, and the no-fault legislation enacted in the seventies unleashed the pent-up demand for divorce that had begun building with the explosion of younger marriages. Divorce rates increased exponentially, peaking in the late seventies at roughly the point where the baby boom children were leaving home.⁸²

More divorce fueled in turn greater wariness about marriage, and greater access to contraception and abortion made it easier to delay marriage and child-bearing. During the "baby-bust" years of the seventies, fertility rates plummeted as younger couples invested more in men's and women's education, and postponed marriage and childbearing. While overall fertility has risen recently, the intervening quarter century transformed pathways into adulthood. A striking change is the age at first marriage. For women, the median age rose from 20 in 1961 to 25.3 in 2005. For men, it increased from twenty-two to twenty-seven

note 72, at 357.

80. Frank F. Furstenberg, Jr., Ruben G. Rumbaut & Richard A. Settersten, Jr., *Between Adolescence and Adulthood: Expectations about the Timing of Adulthood* 4 (The Network on Transitions to Adulthood and Public Policy, Research Network Working Paper No. 1, 2003), available at <http://www.transad.pop.upenn.edu/downloads/between.pdf>; see also Michael J. Shanahan, *Pathways to Adulthood in Changing Societies: Variability and Mechanisms in Life Course Perspective*, 26 ANN. REV. OF SOC. 667, 673 (2000).

81. Indeed, Furstenberg and Fussell emphasized that something had to give for the men as well, as they felt increasing pressure to gain greater skills through prolonged formal education, and at the same time, to marry and establish families. They report that starting in the seventies men began postponing family formation in ever larger numbers that spanned every measurable group. Fussell & Furstenberg, *supra* note 72, at 29.

82. COONTZ, *supra* note 77, at 167.

in the same time period.⁸³ The mother's age at first birth followed a similar pattern, rising from twenty-one in 1961 to twenty-four by 1995.⁸⁴

These changes mean that the median ages for first marriage and first birth have shifted from the period in late adolescence in which social judgment and adult habits are still forming to the period of full maturity in the mid-twenties. The shift in the patterns of family formation corresponds to the change in survey data identifying the hallmarks of adulthood. Researchers find, for example, that whereas in 1960, 77% of the men and 65% of the women had completed all of the major transitions (leaving home, finishing school, becoming financially independent, getting married and having a child) by the age of thirty. Yet in 2000, only 46% of women and 31% of men age thirty had done so.⁸⁵ The changes have been particularly dramatic for women. In 1960, 30% of the twenty year olds, and 70% of the twenty-five year olds had completed all of the major life events. In 2000, by contrast, only 6% of the women had done so by twenty, and 25% by age twenty-five.⁸⁶

With these changes, Americans have also shifted their attitudes toward the markers of adulthood. Ninety-five percent consider education, employment, financial independence, and the ability to support a family to be important milestones on the path to adulthood. Considerably fewer emphasize marriage or children, and overwhelming majorities reject mere assumption of such roles as critical in itself.⁸⁷ Moreover, the majority of Americans believe that young adults *ought not* be ready to support a family before their mid-twenties, and that many will not be able to do so until their thirties.⁸⁸ Instead, younger Americans list first the ability to "accept responsibility for the consequences of

83. U.S. Census Bureau, Estimated Median Age at First Marriage, by Sex: 1890 to the Present (Sept. 21, 2006), <http://www.census.gov/population/socdemo/hh-fam/ms.pdf>.

84. U.S. Centers for Disease Control and Prevention, Median Age of Mother by Live-birth Order, According to Race and Hispanic Origin: United States, Selected Years 1940-1997 tbl.1-5, <http://www.cdc.gov/nchs/data/statab/tab1x05ap.pdf> (last visited Mar. 21, 2008).

85. Fursterberg, Jr., Rumbaut & Settersten, Jr., *supra* note 80, at 3.

86. *Id.*

87. *Id.* at 6-7.

88. *Id.* at 10.

your actions" followed by the capacity to "decide on personal beliefs and values," with "establish[ing] a relationship with parents as an equal adult" and being "financially independent" close behind.⁸⁹ The traits that now mark adulthood are those associated with full cognitive and emotional maturity and financial independence.

B. Family Formation and Inequality

While all American social and economic classes have experienced considerable change in family formation practices, the implications do not play out evenly along class, race, or regional lines. Instead, they have exacerbated existing inequalities. The changes have paid off handsomely for those who have delayed marriage and childbearing, invested in women's as well as men's workforce participation, and embraced the new more egalitarian family roles. Everyone else has seen support for more traditional family values erode without another model commanding consensus support. As a whole, therefore, the resources available for the average child have declined even as they have increased dramatically for those cashing in on what I have called elsewhere "the new middle-class morality."⁹⁰

Sara McLanahan documents the results.⁹¹ She observes that for the upper quarter of the population, defined in accordance with the mothers' educational attainment, things look rosy. Compared to forty years ago, the mothers whose educational achievements place them in the upper quarter of the population reap the benefits of the new system: the

89. Jeffrey Jenson Arnett, *Conceptions of the Transition to Adulthood: Perspectives from Adolescence through Midlife*, 8 J. ADULT DEV. 133, 142 (2001).

90. June Carbone, Review Essay, *Is Fertility the Unspoken Issue in the Debate Between Liberal and Conservative Family Values?*, 32 LAW & SOC. INQUIRY 809, 831 (2007). For an articulation of the values underlying the new middle-class model, see LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006). Marriage ages have risen more sharply than the age of first birth, indicating a dramatically higher rate of non-marital children. The percentage of non-marital births in the United States rose from 5.3% in 1960 to 36.8% in 2005. These figures reflect, in part, the mother's age of birth. Over 50% of children born to mothers between twenty and twenty-four were non-marital in contrast with about a quarter of the births born to women in their late twenties. Taken cumulatively, the percentage of children living with two married parents has fallen from 87% in 1969 to 67% in 2005. *Id.* at 90.

91. McLanahan, *supra* note 2, at 607.

mothers raise children at a more mature age (from twenty-six in 1970 to thirty-two in 2000)⁹² and are more likely to be working at well-paying jobs giving their children access to substantially more resources.⁹³ The labor force participation of the most educated mothers has increased from below 20% in 1970 to over 60% in 2000 while for the least educated, it has risen to only 30% with much of the gain coming during the prosperous nineties.⁹⁴ Moreover, with income rising more dramatically for the better off, family income for well-educated, two-earner parents have skyrocketed. Between 1970 and 2000, the median family income of the best-educated group increased from \$50,000 to \$78,000 per year while the median income for the least-educated families declined and the middle held steady.⁹⁵

More surprisingly, children of the best-educated mothers enjoy more, not less, time with their parents than did children of earlier generations. The adult unions that produce children are at least as stable as they were forty years ago. For the best-educated group, the percentage of single mothers reached its height at just under 10% in 1980 and declined to 7% by 2000.⁹⁶ In contrast, for the least educated mothers, the percentage of single parenthood peaked just below 50% in 1990, and declined to 42% in 2000.⁹⁷ Divorce rates present similarly dramatic contrasts. For the best educated, divorce rates peaked in the late seventies at approximately 2%, then fell steadily through the end of eighties when they returned to the levels of the mid-sixties

92. *Id.* at 609.

93. *Id.* at 608.

94. *Id.* at 611 fig.2. For the least-educated, the labor force participation rates rose from 12% in 1970 to 18% in 1990, but then increased steadily to 30% over the course of the nineties. For everyone else, in contrast, the gains accrue steadily from the seventies forward. *Id.* The most recent figures suggest that the labor force gains for never-married mothers peaked in 2001, and then leveled off with the weaker economy of the last few years. See U.S. DEP'T OF HEALTH AND HUM. SERVS., INDICATORS OF WELFARE DEPENDENCE: ANNUAL REPORT TO CONGRESS III-35 tbl.8 (2007), <http://aspe.hhs.gov/hsp/indicators07/ch3.pdf> (citing U.S. Dep't of Labor, Bureau of Labor Statistics (unpublished tabulations from The Current Population Survey, Annual Social and Economic Supplement, 1975-2005)).

95. McLanahan, *supra* note 2, at 614 fig.6.

96. *Id.* at 612 fig.3.

97. *Id.*

(18%), the era before no-fault divorce.⁹⁸ For the least well off, on the other hand, the rates peaked at 35% in the late seventies, and then leveled off, falling only slightly to 32% by the end of the eighties.⁹⁹ The changing levels of parental involvement complete the picture. From 1975 to 2000, fathers have substantially increased the amount of time they spend with their children, with the most dramatic increases coming for married fathers during the late nineties, and better educated fathers spending more time than less-educated fathers.¹⁰⁰ Working mothers, while spending less time at home than forty years ago, have primarily cut back on the amount of time spent on housework rather than on childcare.¹⁰¹

Taken together, then, the best off children are just as likely as the comparable group forty years ago to live in stable two-parent families, and these families provide even more advantages in terms of access to greater income and parental time and investment.¹⁰² For the least well-off portion of the population, however, the changes in family form exacerbate societal inequalities. The children in these families are dramatically more likely than either the well-off or the poor of forty years ago to be raised in single-parent families, with access to parental time and money that is a much smaller percentage of the resources available to their better off peers. The family has become a site for the reproduction of inequality.¹⁰³

C. *Institutions and Immaturity*

The changes in family form—the increases in non-marital births, divorces, and co-habitation—are well documented. The class-based nature of the changes, however, has received

98. *Id.* at 613 fig.4.

99. *Id.* at fig.5.

100. *Id.* The highest rate of increase, however, was for non-college-educated, married fathers during the period from 1995 to 2000. McLanahan, *supra* note 2, at 613 fig.5.

101. *Id.* at 610.

102. *Id.* at 608 (concluding that “[c]hildren who were born to mothers from the most advantaged backgrounds are making substantial gains in resources. Relative to their counterparts 40 years ago, their mothers are more mature and more likely to be working at well-paying jobs. These children were born into stable unions and are spending more time with their fathers.”).

103. *Id.* at 614-15.

attention only more recently.¹⁰⁴ To the extent these changes have been the subject of debate, that debate has suggested that morals, values, and behavior of the disadvantaged should be the focus of attention.¹⁰⁵ This emphasis on responsibility implies that marriage should be the answer—if only women held out for at least an engagement, men would become more willing to commit to their partners and offspring, and more likely to take on the economic roles necessary to realize those commitments.¹⁰⁶ In response, William Junius Wilson initially argued that the changing labor market held the key; that the disappearance of high paying manufacturing jobs for relatively unskilled men made them less attractive marriage partners.¹⁰⁷ Further research demonstrated that the family behavior of better-employed men, however, fared no better than that of their lesser-employed peers, and employment could explain only a small percentage of the family changes.¹⁰⁸ Economists George Akerloff, Janet Yellin, and Michael Katz suggested that the changes in family form could be explained without a change

104. Of course, these issues first attracted national attention with publication of the Moynihan Report in the mid-sixties, calling attention to the increasing percentage of single-parent African-American families. DANIEL PATRICK MOYNIHAN, U.S. DEPT OF LABOR OFFICE OF PLANNING AND RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (Greenwood Press 1981) (1965). The intense reaction to the report discouraged study of the racial dynamic underlying family breakup for a generation. During the eighties, Charles Murray attempted to sound an alarm suggesting that white working-class families were following the same pattern as the African-American shifts Moynihan highlighted. CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980*, at 162 (1994). For a summary of this debate, see CARBONE, *supra* note 6. More recently, Amy Wax has examined the class- and race-based nature of the shift in family form. See Amy L. Wax, *Engines of Inequality: Race, Class, and Families Structure*, 41 FAM. L.Q. 567 (2007).

105. Charles Murray called attention to the increasing non-marital birth rates among whites as well as African-Americans and attributed the cause to the expansion of welfare. MURRAY, *supra* note 104, at 162.

106. See, e.g., JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 16-21 (2002) (arguing that the issue is rooted in culture, not economics, and is centuries in the making).

107. See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 3-24 (1996); see also WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1987).

108. Robert D. Mare & Christopher Winship, *Socioeconomic Change and the Decline of Marriage for Blacks and Whites*, in *THE URBAN UNDERCLASS* 175, 190-92 (Christopher Jencks & Paul E. Peterson eds., 1991); Robert G. Wood, *Marriage Rates and Marriageable Men: A Test of the Wilson Hypothesis*, 30 J. HUM. RESOURCES 163, 188 (1995).

in morals. That is, they argued that the advent of birth control and abortion changed the number of women willing to engage in sex without a promise to marry, and those women who wanted commitment from their mates were correspondingly less able to secure it.¹⁰⁹ The women ready to begin childbearing at earlier ages accordingly became more willing to have a child outside of the marriages they preferred (even if fewer women overall had children as a result of unplanned pregnancies) and these women—the ones ready to begin childrearing without marriage—are overwhelmingly younger and poorer.¹¹⁰

Only in the last few years have researchers begun to examine these changes not just in terms of changing mores, or in terms of the move away from marriage, but in terms of a new organization of the life course. McLanahan emphasizes that one of the things that distinguishes the family formation practices of the successful elite from their less well-educated peers is age of childbearing.¹¹¹ For the upper quarter of women in her study, the median age of mothers with children under five rose from twenty-six in 1970 to thirty-two in 2000.¹¹² For the rest of the population, it moved up only slightly, increasing from twenty-two to twenty-three for the bottom quartile, and from twenty-four to twenty-six for the middle group.¹¹³ The differences in age play out by race as well. Birth rates for African-Americans are higher than the white rates at every age up until twenty-five and lower at every age thereafter.¹¹⁴ This means that the age of full psychological maturity—the mid-twenties—has become a class and race-based divide for family formation. The elite now overwhelmingly defer childbearing until the age in life where the socialization into adulthood has already occurred; the less advantaged continue to bear children at an age in life where family stability is harder to engineer. What are the consequences?

The most immediate are the greater resources older

109. Akerloff, Yellin & Katz, *supra* note 74, at 307-08.

110. *Id.*

111. McLanahan, *supra* note 2, at 609.

112. *Id.* at 610 fig.1.

113. *Id.*

114. Child Trends Data Bank, Percentage of Births to Unmarried Women 2 fig.1 (2006), available at http://www.childtrendsdatabank.org/pdf/75_PDF.pdf.

parents bring to childrearing. Parents in their late twenties are better educated, psychologically more mature, and more likely to interact with and stimulate young children than are younger parents.¹¹⁵ Moreover, they are almost certainly wealthier, with more material resources to spend on their children, and more of a financial cushion to weather unexpected difficulties.¹¹⁶

Research indicates, moreover, that age is an independent factor in predicting children's outcomes even controlling for the mother's circumstances. In a thirty-year-follow-up study that measured children's well-being in terms of educational attainment, financial independence between ages twenty-seven and thirty-three, and childbearing after the age of twenty, researchers found that mothers over the age of twenty-five had the best outcomes, and teens the worst, after controlling for other factors.¹¹⁷ John Mirowsky and Catherine E. Ross further report that maternal depression is greater for women who have their first child before the age of twenty-three, and falls to its lowest level for women experiencing a first birth around thirty.¹¹⁸ They observe that "[a]n early first birth suggests a poor start in life. It may reflect a disordered transition from adolescence into adulthood and may itself

115. Note that these figures include women with children who range from birth to five, not just the age at which the mothers give birth. McLanahan, *supra* note 2, at 609. Of course, the superiority of older parents has its limits. McLanahan notes that most of the studies finding poor-quality parenting from younger families focus on teens. *Id.* at n.6. Other studies note that the risk of infertility or birth defects rise with age and for single mothers, assistance from parents and other collateral relatives may decrease with age. See, e.g., J. Menken, J. Trussell & U. Larsen, *Age and Infertility*, 23 SCIENCE 1389 (1986); Dawn P. Misra & Cande V. Ananth, *Infant Mortality Among Singletons and Twins in the United States During 2 Decades: Effects of Maternal Age*, 110 PEDIATRICS 1163 (2002); Suzanne C. Tough et al., *Delayed Childbearing and its Impact on Population Rate Changes in Lower Birth Weight, Multiple Birth, and Preterm Delivery*, 109 PEDIATRICS 399 (2002).

116. See ELIZABETH GREGORY, *READY: WHY WOMEN ARE EMBRACING THE NEW LATER MOTHERHOOD 8-9* (2007). See also McLanahan, *supra* note 2, at 609. Of course, older parents may also be less energetic, less flexible, and less likely to assist adult children and grandchildren.

117. Janet B. Hardy et al., *Adolescent Childbearing Revisited: The Age of Inner-city Mothers at Delivery Is a Determinant of Their Children's Self-sufficiency at Age 27 to 33*, 100 PEDIATRICS 802, 807-08 (1997).

118. John Mirowsky & Catherine E. Ross, *Depression, Parenthood, and Age at First Birth*, 54 SOC. SCI. & MED. 1281, 1289-90 (2002) (finding maternal depression greater with younger age of first birth, and the least depression in first-time mothers around age thirty).

disrupt that transition, with life long consequences that influence emotional well-being.”¹¹⁹ They also indicate that the lesser depression that comes with greater parental age may correlate with later first marriages, higher educational attainment, lower risk of having had a prolonged period needing a job but not being able to find one, lower risk of having had periods lacking the money for household necessities, and better current physical health.¹²⁰

The more profound advantages, therefore, may have to do with the new patterns of partnership formation. Evolutionary analysis suggests that younger adults are more focused on the creation of new children, while older adults are focused on the survival of their existing children.¹²¹ Researchers have wondered about the role of grandmothers, who, once the age of childbearing has passed, devote considerable energy to the survival of their grandchildren.¹²² Others have noted that, even with adults still able to bear additional children, relationships become more stable after the mid-twenties. Testosterone levels peak in the mid-twenties and decline thereafter.¹²³ So, too, does divorce, infidelity and alcohol consumption.¹²⁴ Later union formation may increase the odds of stability and success with less societal energy or coercion.

Selecting a mate, moreover, may involve less guesswork. In the early twenties, many prospective suitors look alike, with unrealized promise for as yet unchosen careers. By the late twenties, their prospects are clearer. Alcohol and drug

119. *Id.* at 1281.

120. *Id.*

121. Baird, *supra* note 33, at 11.

122. K. Hawkes et al., *Grandmothering, Menopause, and the Evolution of Human Life Histories*, 95 PROC. NAT'L. ACAD. SCI. 1336, 1336-38 (1998) (demonstrating that humans are unusual in the length of our life spans after reproduction is no longer possible, and speculating that grandmothers' contributions to their daughters' nutrition enhances their fertility).

123. JAMES MCBRIDE DABBS & MARY GODWIN DABBS, *HEROES, ROGUES AND LOVERS: TESTOSTERONE AND BEHAVIOUR* (2000) (stating that male testosterone levels peak after twenty and decline continuously thereafter; average levels are lower for married men than single men).

124. Helen Fisher speculates that relationships may become more stable with age because testosterone levels peak during the mid-twenties and the temptation to seek new partners may decline with falling testosterone levels. HELEN FISHER, *WHY WE LOVE: THE NATURE AND CHEMISTRY OF ROMANTIC LOVE* 201 (2004).

abuse, for example, will be apparent by that point, rather than part of the rite of passage in which the majority of young adults indulge.¹²⁵ Sexual identity is more likely to be firmly established and therefore less of a surprise reason for relationship breakups. Serious psychological problems are more likely to be manifest. And career prospects and financial habits should be much more readily apparent. Those who are poor risks—substance abusers, violent personalities, those unable to hold steady jobs, the bankrupt—may be less likely to marry at all.¹²⁶ Those who are more successful may in turn find it easier to find a mate who shares their background and interests. McLanahan observes that assortative mating, with the best-educated choosing mates with similar educational achievements, is more common than it was forty years ago.¹²⁷ Both the tendency of like to marry like and the accuracy of these predictions may increase the level of societal inequality.¹²⁸

The most far-reaching changes, however, may be a change in the societal structure that shapes the socialization into adulthood. In a trenchant review of these societal changes, Amy Wax seeks to explain why the middle class, which would otherwise appear to accept a variety of family forms, so unequivocally embraces marriage as the locus for childbearing while so high a percentage of the poor do not.¹²⁹ Her answer: despite the equal if not greater advantages of marriage for the least advantaged, relationships do not work because of bad behavior by men. She observes:

[T]he women . . . almost never complain about their men's earning power. Rather, the book is replete with evidence that men's antisocial behavior, not unfulfilled economic expectations, is the main obstacle to matrimony. To be sure, these women's accusations have an economic aspect: they accuse the men of being unwilling to grasp opportunities, work steadily, and spend wisely. . . . These

125. See Alison A. Moore et al., *Longitudinal Patterns and Predictors of Alcohol Consumption in the United States*, 95 AM. J. PUB. HEALTH 458, 458-62 (2005).

126. See, e.g., Eduardo Porter & Michelle O'Donnell, *Facing Middle Age with No Degree, and No Wife*, N.Y. TIMES, Aug. 6, 2006, at A1, A18 (reporting on drop in marriage rates of least-educated men).

127. McLanahan, *supra* note 2, at 614.

128. *Id.* (suggesting limits on intergenerational mobility).

129. Wax, *supra* note 104, at 585.

women's most vociferous complaints are reserved for men's chronic criminal behavior, drug use, violence, and, above all, repeated and flagrant sexual infidelity. . . . These men's sexual habits — and women's complicity in them — produced conflict, jealousy, resentment, mistrust and tumultuous personal lives. . . . These women do not hold their men to new and higher standards. Rather, they ask for the basics of responsible male behavior. Women have always expected this from their husbands, but upper-middle-class women now seem to get it far more often.¹³⁰

Wax is referring to studies of the least well off, but while the factors Wax cites may create more difficulties for poorer populations, all the indicia of "bad behavior" improve with age. Start with alcohol. General studies show that alcohol use tends to peak in the late teens and early twenties and declines thereafter.¹³¹ Binge drinking and marijuana use similarly increase in the years immediately after teens leave home and decrease steadily after the early twenties.¹³²

The same pattern is true of crime and violence. Indeed, Darrell Steffensmeier and Jeffery Ulmer report that:

The view that involvement in crime diminishes with age is one of the oldest and most widely accepted in criminology. Beginning with the pioneering research by Adolphe Quetelet in the early nineteenth century, criminological research consistently has confirmed that (the proportion of) the population involved in crime tends to peak in adolescence or early adulthood and then decline with age.¹³³

The FBI's 2006 crime statistics confirm, for example, that arrests for violent crime peak at eighteen, and decline gradually thereafter while all arrests combined reach their height a year later at nineteen, and show a similar,

130. *Id.* at 590.

131. See Moore et al., *supra* note 125, at 462 (showing sharp decline in alcohol consumption with age; binge drinking peaks during the eighteen to twenty-two age range).

132. John Schulenberg et al., *Early Adult Transitions and Their Relation to Well-Being and Substance Use*, in *ON THE FRONTIER OF ADULTHOOD: THEORY, RESEARCH, AND PUBLIC POLICY* 417, *supra* note 72, at 424.

133. Darrell Steffensmeier & Jeffery Ulmer, Law Library – American Law and Legal Information: Crime and Justice Vol. 1, Age and Crime - Age-crime Patterns For The U.S., Variations In The Age Curve, Variations In Criminal Careers, <http://law.jrank.org/pages/479/Age-Crime.html> (last visited Mar. 21, 2008).

graduated decline.¹³⁴

Further evidence suggests that the number of sexual partners declines with age, controlling for marital status,¹³⁵ and that infidelity is higher for younger spouses.¹³⁶ Personality traits continue to change into adulthood as well. A U.C. Berkeley study, for example, found that conscientiousness increased from twenty-one through age sixty, with the biggest increases in the twenties.¹³⁷ These findings across a variety of behavioral attributes correlate with other studies that show that increased age is a protective factor for relationship stability.¹³⁸

134. U.S. Department of Justice, Federal Bureau of Investigation Criminal Justice Information Services Division, 2006 Crime in the United States tbl.38, http://www.fbi.gov/ucr/cius2006/data/table_38.html (last visited Mar. 21, 2008). The impact of imprisonment in aggravating inequality is potentially staggering. The Fragile Families and Child Well-Being study at Princeton University reports, for example, that (1) one in forty white children born in 1978 and one in twenty-five white children born 1990 had an imprisoned parent; (2) one in seven black children born 1978 and one in four black children born in 1990 had an imprisoned parent; (3) inequality in the risk of parental imprisonment between white children of college-educated parents and all other children is growing; and (4) 50.5% of black children born in 1990 to high school dropouts had an imprisoned father by age fourteen. The study further finds that the incarceration of a parent living with a child increases the likelihood of boys' aggressive behavior during childhood, and those behaviors correlate with increased risk of future criminality. Christopher Wildeman, *Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage* 1 (Princeton Univ. Ctr. for Res. on Child Wellbeing, Working Paper No. 2007-22-F, May 2008), available at <http://crcw.princeton.edu/publications/articles/2008/WP07-22-FF.pdf>.

135. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 192 (1994) (indicating that the number of partners declines dramatically with age).

136. Tom W. Smith, *American Sexual Behavior: Trends, Socio-Demographic Differences, and Risk Behavior* 54 tbl.7 (Univ. of Chicago Nat'l Opinion Res. Ctr., General Soc. Survey Topical Rep. No. 25, 2006), available at <http://www.norc.umd.edu/nr/rdonlyres/2663f09f-2e74-436e-ac81-6ffbf288e183/0/AmericanSexualBehavior2006.pdf>.

137. Sanjay Srivastava, Samuel D. Gosling & Jeff Potter, *Development of Personality in Early and Middle Adulthood: Set Like Plaster or Persistent Change?*, 84 J. PERSONALITY AND SOC. PSYCHOL. 1041, 1041-54 (2003). Conscientiousness is defined as being organized, planful, and disciplined, and past research has linked it to work performance and work commitments. The study found that agreeableness increased the most during a person's 30s while neuroticism declined with age for women but not men, and openness and extraversion showed small, uneven, declines with age. *Id.*

138. Studies have long indicated that early marriage (generally defined as marriage before the woman turns twenty) produces greater instability. See, e.g., Allan Booth & John N. Edwards, *Age at Marriage and Marital Instability*, 47 J. MARRIAGE & FAM. 67, 68, 71 (1985) (summarizing literature and observing

Greater age, of course, is not a magic bullet that guarantees relationship or financial success. Substance abuse and infidelity can and do derail intimate partnerships at any age. Moreover, the severity and form of “bad behavior” reflect societal circumstances, not just raging hormones or unpruned gray matter. Juvenile homicides, for example, spiked in the last decade with greater availability of firearms and declined with more effective law enforcement.¹³⁹ The greater susceptibility of young adults to riskier, irresponsible activities may always be with us, but nothing about that makes high levels of homicide—or a welter of lesser sins—inevitable.¹⁴⁰

that age at marriage is the single best predictor of divorce); Barbara Dafoe Whitehead & David Popenoe, Essay, *The Marrying Kind: Which Men Marry and Why*, THE STATE OF OUR UNIONS: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA, 2004, at 6, available at <http://marriage.rutgers.edu/publications/SOOU/SOOU2004.pdf>. Efforts to indicate why suggest that greater infidelity at younger ages is a significant factor. Booth & Edwards, *supra* at 71; Paul R. Amato & Stacy J. Rogers, *A Longitudinal Study of Marital Problems and Subsequent Divorce*, 59 J. OF MARRIAGE & FAM. 612, 621 (1997). The first comprehensive study by Larry L. Bumpass & James A. Sweet, *Differentials in Marital Instability: 1970*, 37 AM. SOCIOLOGICAL REV. 754 (1972), found that the biggest drops in marital instability occurred as the woman's age of marriage increased from the mid-teens to the late teens (a ten-point drop), and that marital stability continued to improve as women's age at marriage increased from the late teens to the early twenties (five-point drop), and from the early to mid-twenties (three-point drop). *Id.* at 755. The most comprehensive recent study, by the CDC, produced similar results, showing the greatest gains in marital stability when the women's age at marriage increases from the late teens to the early twenties. Ctrs. for Disease Control and Prevention, *Cohabitation, Divorce, Marriage and Remarriage in the United States*, 22 VITAL & HEALTH STATS., July 2002, at 55 tbl.21, http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf. For African-Americans and whites, marital stability continues to improve as the brides' age rises from the early twenties to over twenty-five, but for Latinas, marital stability peaks with marriage in the early twenties and declines thereafter. *Id.* at 18 fig.19. In a parallel study of cohabitation rates, however, the CDC found that the greatest improvements in stability occurred when the woman's age at the start of cohabitation increased from the twenty to twenty-four to the over twenty-five age group. *Id.* at 49 tbl. 15. In contrast with the marriage figures, the CDC found no statistically significant differences between the stability of cohabitation begun in the late teens versus the early twenties. The CDC offered no explanation for these results. It is possible that the institutional role of marriage is more critical to relationship success in the early twenties, but the results may also be explained by differences in the populations who cohabit earlier rather than later in life.

139. DOJ Study Links Juvenile Homicide Rate to Gun Access Laws, CNN.com, May 7, 2000, <http://archives.cnn.com/2000/US/03/07/gun.study>.

140. Indeed, Darrell Steffensmeier and Jeffery Ulmer, after noting that age-

Instead, these factors underscore the importance of the institutions that guide the transition to adulthood. Family formation at later ages requires less societal energy to produce successful unions; intimate relationships as vehicles that steer the transition to adulthood—and the socialization of unruly young males—require considerably more. Historically, the institutions that would have managed the transition included the military, male education, training and employment, oversight of female sexuality, and socialization into gendered family roles.¹⁴¹ Today, for the middle class (male and female), it includes university and post-graduate education, a lengthier period of parent-subsidized acquisition of workplace experience—and the postponement of family responsibilities. For a substantial portion of the rest of the population, it may involve an unmooring from the institutions that once provided guidance, without a ready replacement in sight.¹⁴²

The change in male employment, for example, provides telling evidence. Corcoran and Matsudaira report, in a comparison of white and African-American employment, that:

Over 14% of White men and over 40% of African-American men had accumulated twenty-six or more weeks of non-work in the three years between ages twenty-four and twenty-six years. Few White men, 5-6%, but almost one in four African-American men reported fifty-two or more weeks of non-work between ages twenty-four to twenty-six years. Five percent of African-American men in cohort 2 did not work for pay at all between ages twenty-four to twenty-six.¹⁴³

These employment patterns may mean that young adults not only lose out on the structure full-time employment provides, but “miss out on crucial on-the-job training and

crime patterns are a truism of criminology, emphasized that “considerable variation exists among offenses and across historical periods in specific features of the age-crime relationship (for example, peak age, median age, rate of decline from peak age).” Steffensmeier & Ulmer, *supra* note 133.

141. MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 28 (1993) (describing the greater importance of gender roles in constituting identity in earlier eras).

142. For a comprehensive examination of these changes, see *The Network on Transitions to Adulthood*, <http://www.transad.pop.upenn.edu> (last visited Mar. 15, 2008).

143. Corcoran & Matsudaira, *supra* note 79, at 386.

socialization that are prerequisites for future economic mobility and employment stability.”¹⁴⁴ Moreover, the lack of stable employment may also contribute to a lack of socialization into responsible family roles. The blue-collar-workforce settings in an era of widespread early marriage would, after all, have been dominated by husbands and fathers. Today’s more marginal employment settings for lesser-skilled men may include fewer attractive family role models. The ideals, leisure activities, and expectations of unattached men may be quite different from those of husbands and involved fathers.

Similarly, for working-class women, the transition to adulthood once took place in the context of early childbearing that locked women into dependent roles. So long as their husbands provided support they could not acquire elsewhere, they may have felt obligated to put up with drunken, abusive, or simply inconsiderate behavior.¹⁴⁵ Today’s women, of every social class, enjoy greater opportunities of their own that may make them less inclined to put up with the “bad behavior” Wax describes. The results are mutually reinforcing: weaker employment opportunities for less-skilled men may make them less-attractive partners, women’s greater independence may make them less inclined to put up with “poor catches,” women’s lesser dependence may make men feel less compelled to stay in unsatisfying and poorly paying positions, and men’s lesser employment and weaker family attachments may undermine inculcation of more responsible behavior, which may in turn further aggravate both employment and family stability.

These cycles are not, however, entirely “vicious” ones. The most striking figures to come out of relatively better times in the nineties were shifts in childbearing. Teen births dropped across the board.¹⁴⁶ They dropped more for African-Americans than for whites, and the single largest drop was in

144. *Id.* at 360.

145. See, e.g., MCCCLAIN, *supra* note 90, at 63 (discussing the prevalence of domestic violence in eras with higher rates of marriage).

146. Brady E. Hamilton et al., Ctrs. for Disease Control and Prevention, *Births: Preliminary Data for 2006*, 56 NAT’L VITAL STAT. REP., Dec. 5, 2007, at 2 (revealing that the pregnancy rate among adolescents fell 34% between 1991 and 2005 before it reversed in 2006, rising by 3% among females aged fifteen to nineteen).

the statistic that has the most negative impact on the life chances of mother and child—viz., a drop for African-Americans in the number of second teen births.¹⁴⁷ These drops corresponded to women's increased employment, and that increased employment contributed to both greater esteem for the mothers and better material circumstances for their children.¹⁴⁸ What did not decline was the overall percentage of non-marital births. These figures suggest a new female working-class strategy that places greater emphasis on a mother's autonomy and well-being may hold the potential to better the position of the entire next generation as these mothers acquire the ability to invest more in their children.

The ability to secure greater autonomy and well-being for working-class mothers, however, improves with a delay in childbearing from the late teens to at least the early twenties, assistance in staying in school or gaining employment, and avoiding the birth of a second child too soon after the first. It also suggests that marriage may not be as critical as securing the right support,¹⁴⁹ and that stable partnerships will follow from improvement in the mother's circumstances; perhaps to a greater degree than partnerships contribute to creating that stability in the first place.¹⁵⁰ The question at this stage is

147. Joyce A. Martin et al., Ctrs. for Disease Control and Prevention, *Births: Final Data for 2002*, 52 NAT'L VITAL STAT. REP., Dec. 17, 2003, at 5. African Americans ages fifteen to nineteen experienced the steepest decline in birth rates—42%—from 118 per 1,000 women in 1991 to 68 in 2002. Among African Americans ages fifteen to seventeen, birth rates dropped by 52% between 1991 and 2002. *Id.*

148. See *infra* text accompanying notes 155-72.

149. Fragile Families data indicates that to the extent that women who are unmarried at the time of their child's birth later marry a man other than the father, the man they marry tends to better off than the father. See Sharon H. Bzostek, Marcia J. Carlson, & Sara S. McLanahan, *Mothers' Union Formation Following a Non-Marital Birth: Do Mothers Know Best?* 30 (Ctr. for Res. on Child Well-Being, Working Paper No. 2006-27-FF, 2007), <http://crcw.princeton.edu/workingpapers/WP06-27-FF.pdf> ("[T]he fact that many mothers are 'trading up' in terms of father quality suggests that family instability may have benefits as well as costs.").

150. Although all studies show that married couples produce better outcomes than unmarried couples, this does not mean that any given couple will be better off simply because they marry. The difficulty lies in teasing out the causal effects, as more-troubled parents are less likely to marry, and thus married couples are likely to be different from unmarried couples in ways that go beyond the marriage itself. For efforts to assess the causal relationships, see, e.g., Marcia Carlson, *Trajectories of Couple Relationship Quality After Childbirth:*

whether there is support for this—or any other—new model.

III. 25: THE AGE OF DIVISION?

Political, social, and financial support for new pathways to adulthood is difficult to construct without consensus on the model. Today's recreation of early-adult transitions take place not only at the intersection of class and racial tensions but at the heart of what Justice Scalia has termed a "culture war."¹⁵¹ If there is anything the new middle class model needs to become universal, it is acceptance of the idea that stable partnerships follow more readily from financial independence and emotional maturity. And if there is any controversial idea in today's politically charged times, it is acceptance of non-marital sexuality as part of the ordinary passage from adolescence to adulthood.¹⁵² These shifts, which the middle class has managed through systematic use of contraception (backed up by access to abortion), are an affront to more conservative, religious, and traditional groups in the country.¹⁵³ Moreover, as non-marital sexuality, and especially

Does Marriage Matter? 31 (Ctr. for Res. on Child Well-Being, Working Paper No. 2007-11-FF, 2007), <http://crcw.princeton.edu/workingpapers/WP07-11-FF.pdf> (concluding, after a comparison of couples who cohabit or marry following a non-marital birth, that "[m]arriage at the time of the baby's birth appears to be protective against rapid decline in relationship quality, and yet, getting married after the birth does not significantly improve relationship quality for those who were co-resident anyway"); Cynthia Osborner, *Is Marriage Protective for All Children? Cumulative Risks at Birth and Subsequent Child Behavior Among Urban Families* 13 (Ctr. for Res. on Child Well-Being, Working Paper No. 2007-09-FF, 2007), <http://crcw.princeton.edu/workingpapers/WP07-09-FF.pdf> (finding that children born to married couples are exposed to fewer risks such as low birth weights, smoking within the home, maternal depression, etc., and that these risks explain differences in child outcomes independently of family status).

151. *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

152. Indeed, as a practical matter, at a time when the average length of the span from the beginning of sexual activity to marriage has reached eight years, it is acceptance not only of non-marital sexuality (with 90% of the population engaging in intercourse before marriage), but of the fact that women are likely to have multiple intimate partners before marrying. See Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954-2003*, 122 PUB. HEALTH REP. 73, 75 (2007) (finding that almost all Americans have sex before marrying); Barbara DaFoe Whitehead, *Trends Shaping Youthful Sexuality*, <http://www.nplc.org/commonground/papers/whiteheadpaper.htm> (last visited Apr. 9, 2008).

153. For comprehensive examinations of the differences in values, see KRISTIN LUKER, *WHEN SEX GOES TO SCHOOL: WARRING VIEWS ON SEX -- AND SEX EDUCATION -- SINCE THE SIXTIES* 155-57 (2006); Naomi Cahn & June

non-marital childbearing, are associated with class, racial, and ethnic divisions, they exacerbate the symbolic and cultural meanings associated with devising new strategies for the transition to adulthood. These cultural tensions have undermined support for any of the most promising forms of assistance to the new generation, such as improved access to contraception and assistance in combining work and family. In the process, they have aggravated the inequalities of the new family patterns, as they magnify middle class advantages in adjusting to the new system. These debates—and their consequences—exist at both the symbolic level, as cultural dissonance retards the prospects for agreement on uniform cultural messages, and the practical, as these tensions undermine support for potentially constructive measures.

A. Welfare Reform: Misdrawing the Battlelines

The disconnect between the new realities for the working class and traditional family values occupied a central place in the welfare reform battles of the nineties. The Aid for Families with Dependent Children (AFDC) program had begun in the thirties as a New Deal program primarily designed to benefit pensionless widows.¹⁵⁴ By the end of the sixties, widows had become no more than 10% of the AFDC caseload, and the Supreme Court struck down the remaining eligibility restrictions that limited coverage of unmarried mothers.¹⁵⁵ By 1997, 53% of AFDC recipients were never-

Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459 (2008).

154. See CARBONE, *supra* note 6, at 201. The original "Aid to Dependent Children" (ADC) covered children who had been "deprived of parental support or care by reason of death, continual absence from the home, or physical or mental incapacity of a parent," and allowed the state to set individual eligibility guidelines. LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935*, at 277 (1994) (quoting 42 U.S.C.A. § 606(a) (West 2003)); see also Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Proposals*, 102 YALE L.J. 719, 723 n.33 (1992).

155. CARBONE, *supra* note 6, at 202. The most important remaining restrictions were the "man in the house" rules that deemed the income of a man who spent overnights visits available to the family. *Id.* The Supreme Court invalidated the restrictions in *King v. Smith*, 392 U.S. 309 (1968) (ruling that states could not simultaneously declare a home unsuitable for children and therefore ineligible for assistance, and take no action to remove the children from the home).

married mothers, and 37% were separated, divorced or widowed women.¹⁵⁶ Moreover, the program's original premise—that the mothers of young children were necessarily dependent—became increasingly untenable as the majority of all mothers entered the labor market.¹⁵⁷

Rather than modernize the program, however, the reform debate centered on the parameters of permissible motherhood. Congress named the act “the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.”¹⁵⁸ The preamble stated that “prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock births are very important Government interests”¹⁵⁹ and that the policy contained in the statute was designed to address the crisis in out-of-wedlock childbearing.¹⁶⁰ The Act accordingly sought to promote marriage, marital parenting, and paternal support.¹⁶¹

Liberal opposition attacked the act as an assault on motherhood. Gwendolyn Mink, for example, entitled a book chapter, “Why Should Poor Single Mothers Have to Work Outside of the Home? Work Requirements and the Negation of Mothers.”¹⁶² She condemned the act as “intrusive and patriarchal” because of its insistence that poor women seek paid employment rather than devote their time to their children.¹⁶³

A decade later, both liberal and conservative economists rate welfare reform a success. The results have little to do with marriage, however.¹⁶⁴ Instead, the workforce

156. CARBONE, *supra* note 6, at 203.

157. The labor force participation rates of women with children under eighteen-years-old peaked in the late nineties at 73% and have declined to just below 70% since then. Kieren Healy, *Some Data on Families in the Workplace* (2005), <http://crookedtimber.org/2005/09/22/some-data-on-family-earning-trends>.

158. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 42 U.S.C.S. §§ 601 et seq. (LexisNexis 1996).

159. *Id.* § 601.

160. *Id.*

161. *Id.*

162. GWENDOLYN MINK, *WELFARE'S END* 103 (1998).

163. *Id.*

164. Andrew Cherlin, David Ribar & Robert Moffitt, *Welfare Reform in the Mid-2000s: How African-American and Hispanic Families in Three Cities are Faring* 23 (Johns Hopkins Univ., Welfare, Children and Families: a Three City Study, Working Paper No. 07-01, 2007), available at http://www.conference.aapss.org/papers/aapss_Chерlin_et.al.pdf (reporting that

participation of single mothers increased substantially, and their poverty rates fell.¹⁶⁵ Continued employment paid off significantly for those able secure it.¹⁶⁶ The image of the poor single mother also improved, from that of the stay-at-home “welfare queen” to that of a struggling working parent. Tonya Brito characterizes the change as one from “Madonna to proletariat,” and calls for recognition of the “second shift” as these full time employees also assumed responsibility for single parent home care.¹⁶⁷ The most effective anti-poverty initiatives have correspondingly shifted to medical care, child care, the Earned Income Tax Credit, family leave, and other workplace initiatives.¹⁶⁸ To garner support, they require identification with the refurbished identity of the working mom and involved dad as the heroes of the new family system.¹⁶⁹

Nonetheless, the Bush administration has continued to direct more money toward marriage promotion, with its implicit embrace of more traditional gender roles, rather than workplace support or benefits to children.¹⁷⁰ Judith Koons

while unemployed Latinos have been able to cushion the loss of income to some degree by living in households with other wage-earners, including intimate partners, unemployed African-American mothers have been much less able to do so).

165. *Id.* at 5. Nonetheless, a significant group of single mothers were worse off. That group included women who “were more likely to be African American than white; and . . . more likely to report a physical health limitation, low work skills, a learning disability, no car or driver’s license, and substance abuse.” *Id.* at 6.

166. *Id.* at 23. The authors emphasize, however, that the worst off—unemployed African-Americans with health problems—fare even more poorly than they did before the reforms. *Id.*

167. Tonya Brito, *From Madonna To Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 415 (1999).

168. For a summary of these proposals and a reiteration of welfare reform’s failure to address children’s needs, see Peter Edelman, *Beyond Welfare Reform: Economic Justice in the 21st Century*, 24 BERKELEY J. EMP. & LAB. L. 475, 481-82 (2003).

169. See also Brito, *supra* note 167, at 441-44 (concluding that the absence of a more-accurate image of poor, single mothers also shortchanges the possibility for more-effective assistance).

170. President Bush, for example, vetoed a reauthorization and extension of The State Children’s Health Insurance Program (SCHIP), a federal program that gives funds to states in order to provide health insurance to families with children who otherwise lack insurance but have incomes too high to qualify for Medicaid. Posting of Mark Ames, Nat’l Ass’n of Secondary Sch. Principals Gov’t Relations Mgr., to Principal’s Policy Blog, *Bush Vetoes Children’s Health Bill for Second Time*, <http://www.principalspolicyblog.org/blog/2007/12/>

explains that:

The prominent conservative view is that single motherhood and teenage pregnancy, by themselves, are causes of poverty and dependency. Into the twenty-first-century, marriage is being proposed as the ideal anti-poverty program. In fact, the welfare system is seen as a result of "the collapse of marriage." . . . According to marriage advocates, over the past forty years there has been an "extraordinary shift in cultural norms concerning sex, marriage, and childbearing," including the advent of birth control, the entry of more women into the labor force, and the increasing acceptability of cohabitation outside of wedlock. Widened opportunities for women, including alternatives to marriage, that were the fruits of the women's and civil rights movements are constitutive of this normative shift.¹⁷¹

This emphasis on traditional values misses the changing nature of early adulthood. The failure to recognize the role of age, not just as a matter of teen pregnancy, but of the *maturity* necessary to make either partnership or parenthood more effective, has short-circuited a more realistic debate about the sources of poverty and their potential alleviation.

B. Abstinence Education: Marshalling Troops for the Wrong War

If marriage promotion is something of a detour, pregnancy prevention need not be. The middle class realization of successful marriages comes in part through pregnancy postponement. Research demonstrates, moreover, that women who give birth in their late twenties, even if poor and unmarried, produce better outcomes for their children than younger mothers.¹⁷² Despite these advantages, the

bush_vetoes_childrens_health_b.html (Dec. 18, 2007, 09:35 PST) (discussing H.R. 3963, 110th Cong. (2007)).

171. Judith E. Koons, *Motherhood, Marriage, and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy*, 19 WIS. WOMEN'S L.J. 1, 22-23 (2004); see also Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1663 (2005).

172. A recent study indicates that age is an independent factor in predicted children's outcomes even controlling for the mother's circumstances. In a thirty-year-follow-up study that measured children's well-being in terms of educational attainment, financial independence between ages twenty-seven and thirty-three, and childbearing after twenty, researchers found that mothers

emphasis on marriage promotion has often been coupled with policies that make earlier birth more likely.

The now dismantled AFDC system, for example, required that states offer family planning services to welfare recipients.¹⁷³ Temporary Assistance to Needy Families (TANF), in contrast, does not.¹⁷⁴ The Kaiser Family Foundation, in a fifty state study, found that only six states reported using TANF funds to provide contraceptive services to low-income women.¹⁷⁵ Instead, TANF permitted the federal government to provide states with funds to promote abstinence education.¹⁷⁶ Congress authorized additional funds through Community-Based Abstinence Education (CBAE). Overall funding has increased from \$10 million in 1997 to \$167 million in 2005 to \$177 million in 2007.¹⁷⁷

Abstinence-only education, however, which preaches abstinence without providing information about contraception, has proven ineffective on several levels. First, there is no evidence that abstinence-only education in fact promotes abstinence, or produces a decline in either teen or non-marital births.¹⁷⁸ Second, some studies show that

over the age of twenty-five had the best outcomes, teens the worst, after controlling for other factors. See Hardy et al., *supra* note 117, at 807-09; see also John Mirowsky & Catherine E. Ross, *Depression, Parenthood, and Age at First Birth*, 54 SOC. SCI. & MED. 1281, 1290 (2002) (finding maternal depression greater with younger age of first birth, and the least depression in first time mothers around age thirty).

173. 42 U.S.C. § 602(a)(15) (repealed 1996).

174. JODIE LEVIN-EPSTEIN, CTR. FOR LAW & SOC. POL'Y, TWO SIDES OF THE SAME COIN OR A TOSS OF THE COIN?: FAMILY PLANNING SERVICES AND FAMILY CAP IMPLEMENTATION, 2 (1999), available at http://www.clasp.org/publications/two_sides_of_the_same_coin.pdf.

175. Jodie Levin-Epstein, Deputy Dir. for the Ctr. For Law and Soc. Pol'y, The Henry J. Kaiser Family Found., *Welfare, Women, and Health: The Role of Temporary Assistance for Needy Families*, ISSUE BRIEF: AN UPDATE ON WOMEN'S HEALTH POL'Y, Apr. 2003, at 7, available at http://www.clasp.org/publications/women_TANF.pdf. The lack of more-effective access to contraception may have contributed to an increase in abortions by poor women. Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 176-80 (2006).

176. 42 U.S.C.S. § 710 (LexisNexis 2000).

177. CARMEN SOLOMON-FEARS, CONG. RES. SERV. REP., REDUCING TEEN PREGNANCY: ADOLESCENT FAMILY LIFE AND ABSTINENCE EDUCATION PROGRAMS 25 (2005).

178. CHRISTOPHER TRENHOLM ET AL., MATHEMATICA POL'Y RES., INC., FINAL REPORT: IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS xvii fig.1 (2007), available at <http://www.mathematica->

abstinence-only education leaves teens less prepared for the sexual relations they later develop, with a corresponding increase in unplanned pregnancies and sexually transmitted diseases.¹⁷⁹ Finally, an emphasis on abstinence, if effective, is likely to be associated with younger marriages,¹⁸⁰ which in turn are more likely to end in divorce.¹⁸¹ The result of a focus on abstinence education is accordingly more likely to be reinforcement of an ideological position than deterrence of early or improvident childbearing. Such programs then

mpr.com/publications/PDFs/impactabstinence.pdf (finding that four to six years later, participants in abstinence programs were no more likely to avoid intercourse than the control group not enrolled in the program, and virtually no differences existed between the age of first sexual intercourse and the rate of unprotected sex for those who had received abstinence education compared to those in the control group); John S. Santelli et al., *Explaining Recent Declines in Adolescent Pregnancy in the United States: The Contribution of Abstinence and Increased Contraceptive Use*, 97 AM. J. PUB. HEALTH 150, 152-54 (2007) (discussing that comprehensive sex education programs are more effective at reducing pregnancies and sexually transmitted diseases), available at http://opr.princeton.edu/seminars/papers%5CRecent_declines_in_adol_pregnancy_NSFG.pdf; see also Hazel Beh & Milton Diamond, *Children and Education: The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex*, 15 COLUM. J. GENDER & L. 12, 38-42 (2006) (summarizing reviews of the programs' effectiveness); Hannah Bruckner & Peter Bearman, *After the Promise: The STD Consequences of Adolescent Virginity Pledges*, 36 J. ADOLESCENT HEALTH 271, 273-74 (2005). Heritage Foundation scholars, however, have criticized the findings of some of these studies. See Robert Rector & Kirk A. Johnson, Heritage Found., *Adolescent Virginity Pledges and Risky Sexual Behaviors* (Paper presented at The Eighth Annual National Welfare Research and Evaluation Conference of the Administration for Children and Families, U.S. Dep't of Health and Hum. Servs., June 14, 2005), http://www.heritage.org/research/welfare/upload/9314_1.pdf.

179. Douglas Kirby et al., *The Impact of Postponing Sexual Involvement Curriculum Among Youths in California*, 29 FAM. PLAN. PERSP. 100, 105, <http://www.guttmacher.org/pubs/journals/2910097.pdf> (concluding that California program did not prevent sexual activity but did increase pregnancy rates of participants); Bruckner & Bearman, *supra* note 178, at 273-77; see also Santelli et al., *supra* note 178, at 152-54 (finding that comprehensive sex education programs are more effective at reducing pregnancies and sexually transmitted diseases).

180. For a thoughtful examination of this issue, see Barbara DaFoe Whitehead, Trends Shaping Youthful Sexuality, <http://www.nplc.org/commonground/papers/whiteheadpaper.htm> (last visited Mar. 21, 2008) (emphasizing the untenability of abstinence in a world in which the average wait between the beginning of sexual experience and marriage has grown to eight years for women and ten for men. For African-Americans, the wait is twelve years for women and nineteen for men).

181. Amato & Rogers, *supra* note 138, at 621; Booth & Edwards, *supra* note 138, at 71.

disproportionately disadvantage low-income women, who are more likely to be dependent on school and public services for information and support. A study during the Clinton years indicated that by 2000 the number of young black and Hispanic women receiving abstinence-only instruction in lieu of other forms of sex education had significantly increased, and exceeded the portion of white women receiving such instruction. In addition, young women living below 200% of the poverty level were more likely to receive abstinence-only instruction (or no sex education at all) than higher-income women. Two-thirds of white women had received instruction about contraception prior to their first sexual encounter, compared with fewer than half of their black peers.¹⁸² The population most at risk of unintended pregnancies and sexually transmitted diseases is thus offered the least preparation and assistance.

C. Access to Contraception and Abortion: The Battleground That Matters

Both proponents of abstinence-only education and those who prefer comprehensive sex education recognize that such instruction cannot be effective in isolation. Proponents, who wish to emphasize individual moral responsibility, see the transition to adulthood as one that moves from abstinence to adult roles through courtship and marriage.¹⁸³ The abstinent must be convinced to “save” themselves for the marital roles that provide the exclusive pathway to family life. Those who favor comprehensive sex education, in contrast, view sexuality in terms of autonomy and choice, and identify responsibility with effective contraception rather than purity.¹⁸⁴

182. Laura Duberstein Lindberg, John S. Santelli & Susheela Singh, *Changes in Formal Sex Education: 1995-2002*, 38 PERSP. ON SEXUAL & REPROD. HEALTH 182, 185-86 (2006), available at <http://www.guttmacher.org/pubs/journals/3818206.html>.

183. See LUKER, *supra* note 153, at 99 (emphasizing that sex for conservatives is “sacred” while for liberals, it is natural). For a rejection of the position that lack of access to contraception will deter sexuality, see *Carey v. Population Servs. Int’l*, 431 U.S. 678, 699 (1977) (holding that statute that denied teens access to condoms on such grounds did not pass constitutional muster).

184. Indeed, both liberals and conservatives cite the following passage in *Planned Parenthood v. Casey*:

For the middle class, access to effective contraception is an important component of the transition to adulthood; for conservatives, it is a lynchpin in the cultural shift away from marriage.¹⁸⁵ The net result of this conflict may ultimately be secure access for the middle class, and declining availability for those dependent on government services.

The most telling evidences of these shifts come in the fight over who deserves credit for the drop in teen births in the nineties, a development both groups applauded. The conservatives wished to attribute the decline, which included a reduction in the number of abortions during the same period, to greater abstinence, the liberals to greater use of birth control. The liberals appear to have the better case. A careful study of data from the National Survey of Family Growth examined the bases for the declining teenage pregnancy rate from 1995-2002.¹⁸⁶ The researchers found: the rate of sexual intercourse for fifteen to seventeen year-olds declined by about 17%, while it remained fairly stable for eighteen to nineteen year olds; the pregnancy risk for fifteen to seventeen year olds fell by 55%, while it declined by 27% for eighteen to nineteen year olds; the rate of condom use by fifteen to seventeen year olds increased by 20%, from 38% to 58%, while it increased from 34% to 50% for eighteen to nineteen year olds; and the researchers demonstrated that 14% of the change in pregnancy risk for fifteen to nineteen year olds was a decline in the number of sexually active young women, while 86% of the decrease resulted from changes in contraceptive use.¹⁸⁷ The overall decline in teen births was significant, and the decline was greater for African-Americans than for whites.

Nonetheless, the improvements that came from better

[I]n some critical respects the abortion decision is of the same character as the decision to use contraception . . . for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.

505 U.S. 833, 853, 856 (1992). See Janet Smith, *The Connection Between Contraception and Abortion*, <http://www.goodmorals.org/smith4.htm> (last visited Mar. 16, 2008); see also MCCLAIN, *supra* note 90 (articulating a liberal feminist view of family values).

185. See Koons, *supra* note 171, at 22-23.

186. Santelli et al., *supra* note 178, at 152-54.

187. *Id.*

contraceptive use were very much an age and class-based event, and cost was an important barrier for low-income women in securing access at all.¹⁸⁸ The Guttmacher Institute reports that the “unintended pregnancy rate rose 29% among women living below the poverty level and 26% among women living between 100% and 200% of the poverty level, but fell 20% among more affluent women.”¹⁸⁹ It increased as well for high school dropouts, and women between the ages of nineteen and twenty-four, while declining for adolescents and college graduates.¹⁹⁰ In addition, while overall rates of contraception use increased in the 1990s, the rates have declined since 2002 due to rising non-use among low-income women of color.¹⁹¹ In 2006, teen pregnancies rose for the first time since 1991, and the racial group with the largest increase was black women aged fifteen to nineteen.¹⁹²

As a result, access to abortion is more critical to reproductive choice for poorer women and women of color.¹⁹³

188. THE CTR. FOR REPRODUCTIVE RIGHTS, WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES: A SHADOW REPORT 14-15 (Report prepared for the eighty-seventh session of the Human Rights Committee June 2006), *available at* <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/crr.pdf>.

189. HEATHER D. BOONSTRA ET AL., ABORTION IN WOMEN'S LIVES 26 (Guttmacher Institute 2006), *available at* <http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf>.

190. See Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSP. ON SEXUAL AND REPROD. HEALTH, June 2006, at 89, 93 tbl.1.

191. BOONSTRA ET AL., *supra* note 189, at 25-26. Racial disparities track the class divisions. Blacks, Hispanics, and women of other races and ethnicities are less likely to use contraception than whites. Latinas, for example, are three to four times more likely than white women to use no method of contraception. Nat'l Ctr. for Health Stat., *Fertility, Family Planning and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth*, 23 VITAL & HEALTH STAT. Dec. 2005, at 101 tbl.62; *see also* Rachel K. Jones et al., *Contraceptive Use Among U.S. Women Having Abortions in 2000-2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH, 294, 295 (2002).

192. Hamilton et al., *supra* note 146, at 2 (revealing that the pregnancy rate among adolescents fell 34% between 1991 and 2005 before it reversed in 2006, rising by 3% among females aged fifteen to nineteen).

193. A 2002 Guttmacher Institute study reported that on the basis of data collected in seventeen states that between one-third and one-half of all births were unintended. Rachel K. Jones, Jacqueline E. Darroch & Stanley K. Henshaw, *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH, 226, 229 (2002). Older studies indicate that over 50% of all pregnancies in United States each year (a total of 3.4 million) are unintended and that failed contraceptives account for 43% of those unintended pregnancies. Rebekah J. Smith, *Family Caps In Welfare Reform: Their Coercive Effects And Damaging Consequences*, 29

Rebekah Smith emphasizes that while overall abortion rates were declining in the nineties,¹⁹⁴ the “abortion rate among poor women increased substantially. . . . Increasingly, women obtaining abortions were never-married, low-income, non-white or Hispanic, and usually the parent of at least one child.”¹⁹⁵

A *New York Times* editorial recently emphasized that:

Almost two-thirds of the decline in the total number of abortions can be traced to eight jurisdictions with few or no abortion restrictions—New York, New Jersey, Massachusetts, Illinois, California, Oregon, Washington State and the District of Columbia, . . . places . . . that have shown a commitment to real sex education, largely departing from the Bush administration’s abstinence-only approach. These jurisdictions also help women avoid unintended pregnancies by making contraception widely

HARV. J.L. & GENDER 151, 176-77 (2006) (citing RACHEL B. GOLD, ABORTIONS AND WOMEN’S HEALTH: A TURNING POINT FOR AMERICA? 11 (1990)). The Center for Reproductive Rights further reports that:

While the overall rate of unintended pregnancy has declined since 1994, disaggregated data by race and ethnicity and income reveals that it remains very high for poor women of color. The rate for black women is twice the national average, and two-thirds of pregnancies of black women are unintended. Latinas have a 75% higher unintended pregnancy rate than non-Hispanics, and low income Latinas are nearly twice as likely to have an unintended pregnancy as low-income white women. In 2006, teen pregnancies rose for the first time since 1991, and the racial group with the largest increase was black women aged 15-19.

Letter from Nancy Northrup, President, Ctr. for Reproductive Rights, to Nathalie Prouvez, Secretary, Comm. on the Elimination of Racial Discrimination (Dec. 19, 2007), available at http://www.reproductiverights.org/pdf/CERD_12.19.07.pdf (citing *Finer & Henshaw*, *supra* note 190, at 94 (2006)); *BOONSTRA ET AL.*, *supra* note 189, at 28.

194. The overall abortion rate in 2000 in the United States fell to 21 per 1000 women, a decline of 11% from 1994. *Jones, Darroch & Henshaw*, *supra* note 193, at 233.

195. *Smith*, *supra* note 175, at 177. Among poor women, defined as those with incomes below 200% of the poverty line, abortion rates increased between 1994 and 2000 by 25%. *Jones, Darroch & Henshaw*, *supra* note 193, at 228 tbl.1. Poor women constituted 30% of all women of reproductive age in the United States, yet they obtained 57% of the abortions in 2000. *Id.* at 231. During this period, white women had the lowest abortion rates (1.3%) while black women had the highest (4.9%). White women also had lower pregnancy rates, with only 18% of conceptions ending in abortion. Among blacks, who had a higher pregnancy rate, 43% of conceptions ended in abortion. Hispanics terminated pregnancies 25% of the time. *Id.* at 231-32.

available.¹⁹⁶

The editorial concluded that “prevention works”¹⁹⁷ and abortion restrictions primarily hurt poorer women, who postpone abortion until later in the pregnancy.¹⁹⁸ The availability of abortion also most critically affects women in their early twenties, the age group most likely to experience an unwanted pregnancy and most likely to have an abortion.¹⁹⁹

The primary impact of the failure to promote comprehensive family planning is exacerbation of the class divide in control of women’s—and especially young women’s—reproductive choices. A consensus should exist on the importance of preventing unplanned pregnancies. Yet, politicization of the abstinence and marriage program efforts has made the availability of family planning a product of political geography—a geography that disproportionately disadvantages poorer parts of the country.²⁰⁰

196. Editorial, *Behind the Abortion Decline*, N.Y. TIMES, Jan. 26, 2007, available at http://www.nytimes.com/2008/01/26/opinion/26sat2.html?_r=1&scp=2&sq=abortion+contraception&st=nyt&oref=slogin.

197. *Id.* The link between contraception and abortion nonetheless remains a site of political controversy, with social value conservatives maintaining that an emphasis on abstinence and marriage should correlate with both less contraception (presumably outside of marriage) and less abortion. Credible empirical studies, however, draw the opposite conclusion, viz., that increases in the availability and effectiveness of contraception decrease the abortion rate. See, e.g., Cicely Marston & John Cleland, *Relationships Between Contraception and Abortion: A Review of the Evidence*, 29 INT’L FAM. PLAN. PERSP., Mar. 2003, at 6. But see Smith, *supra* note 184 (“[T]he connection between contraception and abortion is primarily this: *contraception facilitates the kind of relationships and even the kind of attitudes and moral characters that are likely to lead to abortion.*”).

198. *Behind the Abortion Decline*, *supra* note 196.

199. Between 1994 and 2001, the rate of unintended pregnancy remained the same (at 49% of all pregnancies), but “was substantially above average among women aged 18–24, unmarried (particularly cohabiting) women, low-income women, women who had not completed high school and minority women.” Finer & Henshaw, *supra* note 190, at 90.

200. For a comprehensive analysis of state-by-state efforts, see The Guttmacher Inst., *Contraception Counts: Ranking State Efforts*, 1 IN BRIEF (2006), available at <http://www.guttmacher.org/pubs/2006/02/28/IB2006n1.pdf>. The U.S. Supreme Court invalidated a N.Y. law in 1977 that banned condom sales to those under sixteen, holding that “[s]ince the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is . . . foreclosed.” *Carey v. Population Servs. Int’l*, 431 U.S. 678, 694 (1977). The states, however,

Poorer women's lack of access stems from: a general lack of access to medical insurance; cutbacks in the Medicaid program that restrict immigrants' eligibility generally, disproportionately affecting Latinas, and increasing documentation requirements that delay or frustrate access even for those women who are eligible;²⁰¹ lack of adequate funding for Title X and other public family planning efforts; restrictions on federal funding of abortion and related services; and lack of coverage for reproductive services, including contraception, in many private health plans.²⁰²

The failure to fund the federal programs that exist and the inclusion of welfare-based support efforts in block grants has effectively left administration of family planning efforts to the states. Congress established the Title X program in 1970, which provides public funding for family planning and preventive health screening services. In 1978, Congress amended Title X to place "a special emphasis on preventing unwanted pregnancies among sexually active adolescents."²⁰³ Yet, the most recent head of the family planning office, Susan Orr, has opposed efforts to expand access to contraception, and applauded a Bush proposal to cease contraceptive coverage under health insurance for federal employees that specifically affects teenagers.²⁰⁴ Moreover, Congressional funding for the Title X program is now 61% less in inflation-adjusted dollars than in 1980, despite needs that have escalated with the decimation of other programs.²⁰⁵

have threatened to mount challenges to the continued availability of contraceptive services without parental consent, and as the constitutional limits on state restrictions of abortion fall by the wayside, so too may constitutional protection of minors' right of access to contraception.

201. The Kaiser Family Foundation, for example, documents declining enrollment in Medicaid family planning services. Guttmacher Inst. & Kaiser Family Found., *Medicaid's Role in Family Planning*, WOMEN'S ISSUE BRIEF, Oct. 2007, at 5 fig.4, available at http://www.guttmacher.org/pubs/IB_medicaidFP.pdf.

202. On the issue of private insurance coverage, see The Guttmacher Inst., *Insurance Coverage of Contraceptives*, STATE POLICIES IN BRIEF, Mar. 1, 2008, http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.

203. Posting of Heather Corinna to Scarleteen, http://www.scarleteen.com/blog/heather/2007/10/19/low_income_access_to_contraception_orr_not_0 (Oct. 19, 2007, 16:48 EST) (quoting S. REP. NO. 95-822, at 24 (1978)).

204. Corinna, *supra* note 203.

205. Rachel Benson Gold, *Stronger Together: Medicaid, Title X Bring Different Strengths to Family Planning Effort*, 10 GUTTMACHER POL'Y REV.,

Progress in the greater availability of reproductive services, in contrast, has split along class lines. The number of private medical insurance programs covering contraception, for example, increased at the same time as the cuts in public funding.²⁰⁶ Similarly, the availability of emergency contraception such as the “morning after pill” increased as abortion services available later in a pregnancy declined.²⁰⁷

D. Family Leave: The Invisible Front

More effective pathways to adulthood require not just avoiding early pregnancy, but managing the transition to meaningful adult roles. The relative success of welfare reform demonstrates the potential for remaking single mothers’ roles to include workforce participation together with parenthood. The payoffs have included increased self-

Spring 2007, at 15, available at <http://www.guttmacher.org/pubs/gpr/10/2/gpr100213.pdf> (discussing how Title X clinics are struggling to meet the health needs of the rising numbers of immigrants ineligible for Medicaid); see also Cynthia Dailard, *Challenges Facing Family Planning Clinics and Title X*, GUTTMACHER REP. ON PUB. POL’Y, April 2001, at 8-10, available at <http://www.guttmacher.org/pubs/tgr/04/2/gr040208.pdf>; ADAM SONFIELD ET AL., COST PRESSURES ON TITLE X FAMILY PLANNING GRANTEES, FY 2001–2004, at 4 (Guttmacher Inst. 2006), available at <http://www.guttmacher.org/pubs/2006/08/01/CPTX.pdf> (explaining that Title X funded clinics reported an average cost increase of 58% from 2001–2004 for language assistance services to serve non-native English speakers). Overall, Medicaid funding for family planning has increased, and much of the increase directed toward contraception has been concentrated in fourteen states.

206. Adam Sonfield & Rachel Benson Gold, *New Study Documents Major Strides in Drive For Contraceptive Coverage*, 7 GUTTMACHER REP. ON PUB. POL’Y, June 2004, at 4, available at <http://www.guttmacher.org/pubs/tgr/07/2/gr070204.pdf>.

207. See BOONSTRA ET AL., *supra* note 189, at 1 (discussing greater availability of abortion earlier in the pregnancy as the number of abortion providers has declined); see also Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL’Y REV., Winter 2007, at 15, <http://www.guttmacher.org/pubs/gpr/10/1/gpr100112.pdf> (“Research indicates that women who are economically disadvantaged are delayed at two key stages. Poor women typically take more time than better-off women to confirm a suspected pregnancy. . . . In addition, they take several more days between making the decision to have an abortion and actually obtaining one. When asked why they were delayed at this stage, poor women are about twice as likely as more affluent women (after controlling for other personal characteristics) to report having difficulties in arranging an abortion, usually because of the time needed to come up with the money.”).

esteem, greater material resources, and better role models for children.

The downsides, of course, involve the difficulties of combining full time employment with care of young children. These difficulties, which all working mothers face, are exacerbated for those who cannot take time off to deal with children's unforeseen needs, including sickness, accidents, appointments, and homework. The flexibility of the workplace is another arena that divides along class lines, exacerbating income and racial inequalities. Moreover, to the extent that poorer women are more likely than their privileged counterparts to have children at younger ages and on their own, the lack of family-friendly workplaces will disproportionately interfere with younger mothers' entry into paid employment at all.

Disparities in family leave capture some of the divisions. Low-income workers are less likely than higher-income workers to be covered by family leave policies, less likely to be eligible for family leave, and less likely to receive paid family leave.²⁰⁸ Roughly 40% of working parents with incomes below 200% of the federal poverty level have no paid leave at all (i.e., no paid sick days, vacation, nor personal days).²⁰⁹ Among entry-level employees leaving welfare for work, only 17% had paid leave; 75% of all low-wage workers lack sick leave entirely.²¹⁰

These disparities make it much more likely that poor women will leave the workforce because of pregnancy. Ann O'Leary reports that, "From the 1960s to the 1990s, . . . access to maternity leave for working-class women remained nearly constant, whereas access increased more than fourfold for professional women."²¹¹ As a result less educated workers are two-and-a-half times more likely to quit their jobs upon the birth of their first child than women with a bachelor's degree or higher (46% compared to 19%), and they are three times more likely to be fired upon the birth of their child (6.2% compared to 1.9%).²¹²

208. Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 8 (2007).

209. *Id.*

210. *Id.* at 7.

211. *Id.* at 6.

212. *Id.* at 7. O'Leary reports further that:

Background state laws exacerbate the class differences. Several states (California, Minnesota, and Washington) have enacted paid family leave legislation, and a series of others have considered it.²¹³ More generally, states vary with respect to a series of parental leave and maternity benefits and job protection for both state and private sector employees. Particularly with respect to the protections mandated for private employers, the states that require such protections are wealthier, more liberal and more likely to vote Democratic.²¹⁴ The background laws, to the extent they make it more likely that low income single mothers will find it difficult to remain employed, complicate socialization into adult workforce roles.²¹⁵

In March 2005, 54% of workers who made more than \$15 per hour had access to a short-term disability policy, while only 28% of workers earning less than \$15 per hour had access to a short-term disability policy. Similarly, 46% of workers who made over \$15 per hour had access to long-term disability leave, while only 16% of workers making less than \$15 per hour had access to long-term disability leave. There are similar disparities in access to paid sick leave and paid holidays. Eighty-eight percent of workers making more than \$15 per hour had access to paid holidays, and 75% of these workers had access to paid sick leave. Meanwhile, 68% of workers earning less than \$15 per hour had access to paid holidays, and only 47% had access to paid sick leave.

Id. at 8.

213. Press Release, Debra L. Ness, President, Nat'l Partnership for Women and Families, Washington State's Paid Family Leave Law a Victory for Working Families, National Women's Leader Says (May 8, 2007), *available at* http://www.nationalpartnership.org/site/PageServer?pagename=newsroom_pr_PressRelease_070508; *see generally* National Conference of State Legislatures, State Family and Medical Leave Act Laws, <http://www.ncsl.org/programs/employ/fmlachart.htm> (last visited Mar. 16, 2008).

214. *Id.* The analysis included family leave benefits (CA first state to adopt), medical/maternity leave benefits (CA, HI, NJ, NY, RI), flexible sick days (CT, HI, WA, WI), at home infant care programs (AHIC) (MN, NM, MT suspended because of budget shortfall), expanded job protection for employees taking family leave (ME, MA, MN, OR, VT, DC), expanded job protection for medical maternity leave (DC, CA, CT, HI, IA, LA, ME, MA, MT, NH, OR, SC, VT, WA), extended family and medical leave (CA, CT, LA, NJ, OR, RI, TN, WA), state family leave laws (DC, CA, CT, HI, ME, MN, NJ, OR, RI, VT, WA, WI). *Id.*

215. I take no position here on the classic arguments that increased employer mandates will make job creation more expensive and thus result in greater unemployment. My argument here is only that class-based disparities at a time of different pathways to adulthood make it more likely that less educated single-mothers will find it more difficult to get and hold jobs than their better educated peers who delay child-bearing. I note, however, that the long term marginalization of these women and their children imposes costs on the greater society, and that greater support for their inclusion in the workplace would

E. Missing in Action: Men, Education, and Employment

The information economy has expanded the demand for women's labor.²¹⁶ As a result, the transition to adulthood for women focuses on balancing the demands of the workforce with the demands of childbearing. The challenge for men is potentially greater as the new economy has undermined both the workforce and the family roles for lower income men. The comparison between men's and women's position in the new economy is reversing customary roles, especially among the working class.

Consider education rates. Women are now more likely than men to graduate from college (21.3% to 17.8%) and high school (61.5% to 59.8%).²¹⁷ Employment rates for youths aged sixteen to twenty-four have reached a historic low, and earnings for the age group from eighteen to twenty-four were lower in the late nineties, a time of relative prosperity, than in the late eighties or early seventies.²¹⁸ Men's occupational status in the work place is now lower than women's with 40% of women aged eighteen to thirty-four holding professional, technical, or white-collar positions compared to only a quarter of the men.²¹⁹ Both hourly wages and employment figures have correspondingly decreased for men while increasing for women.²²⁰ Racial inequality has also worsened, with African-American men born in the sixties faring worse than African-

bring benefits.

216. See Henry S. Farber, *Is the Company Man an Anachronism? Trends in Long Term Employment, 1973-2005*, at 12 in *THE PRICE OF INDEPENDENCE: THE ECONOMICS OF EARLY ADULTHOOD* (Sheldon Danziger & Cecilia Rouse eds., 2007), available at <http://www.transad.pop.upenn.edu/downloads/farber%20with%20cover%20sheet.pdf>. Labor force studies show increases in the positions typically held by women (e.g., clerical and service sector employment) and declines in typically male positions (e.g., manufacturing jobs). See, e.g., J.J. Dolado, F. Felguerosa & J.F. Jimeno, *Female Employment and Occupational Change in the 1990's, How is the EU Performing Relative to the U.S.?*, 45 EUR. ECON. REV. 875, 882-83 (2001) (employment changes have tended to increase employment in "typical" female occupations and reduce it in "typical" male occupations).

217. Men exceed women among high school dropouts by 22.4 to 17.1%. The Network on Transitions to Adulthood, *Fast Facts: Work and Education*, http://www.transad.pop.upenn.edu/trends/facts_wa.htm (last visited Mar. 16, 2008).

218. Members of the age group from sixteen to twenty-four were more likely to be employed part-time, however, than they were in 1973. *Id.*

219. *Id.*

220. *Id.*

American men born a decade earlier.²²¹ In addition, African-American women have outpaced African-American men's educational and employment prospects to an even greater degree than white women have gained on white men.²²²

Better educated, more affluent, and more ambitious Americans spend the years between sixteen and twenty-four in school, or in temporary positions that add to their later employability.²²³ A high percentage of lower-income men in this age group, however, are neither in school nor employed on a regular basis.²²⁴ For the least-advantaged men, prison has become the single institution most likely to shape the transition to adulthood.²²⁵

Moreover, even for those who secure full time

221. *Id.*

222. For a comprehensive examination of this issue, see ORLANDO PATTERSON, *RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES* (1998). He reports, for example, that by the nineties, not only were African-American women substantially more likely to graduate from college than African-American men, but they had also become more likely to acquire a professional degree. *Id.* at 18-19 figs.1.9 & 1.10. Indeed, in examining graduate degrees in business, law, dentistry and medicine, African-American women earned more degrees than African-American men in *every* category, while only one other group of women (Asian-American women in law) were more likely to earn a degree than men in the same ethnic group in *any* category. *Id.*

223. Of those between the ages of eighteen and thirty-four, 61% have some college and 19% have college degrees. Children in the top quartile income category, however, receive at least 70% more in material assistance than those in the bottom income quartile even though they are only 10-15% more likely to attend college. Fast Facts: Work and Education, *supra* note 217.

224. Corcoran & Matsudaira report, for example, that a sizeable percentage of minority of men in their mid-twenties, particularly African-American men, were not either in school or the labor market full time. Corcoran & Matsudaira, *supra* note 79, at 357. More than 14% of whites and a quarter of African-American men reported fifty-two weeks or more of non-work between the ages of twenty-four and twenty-six. Fast Facts: Work and Education, *supra* note 217.

225. The figures are stunning. Stephen Raphael reports that:

Young men in their early twenties are especially likely to have served time. Their risk of imprisonment has tripled between 1979 and 2001. For all racial and ethnic groups, less-educated men are considerably more likely to be incarcerated than more educated men. However, less-educated black men have the highest incarceration rates. The author calculates, using California prison data, that 90% of black male high school dropouts now aged 45 to 54 have been or are in jail.

Stephen Raphael, *Early Incarceration Spells and the Transition to Adulthood*, in *THE PRICE OF INDEPENDENCE: THE ECONOMICS OF EARLY ADULTHOOD*, *supra* note 216 (demonstrating that incarceration delays or derails more conventional aspects of that transition such as employment, education, marriage, and living independently).

employment, the rate of employment turnover has increased in the economy as a whole, making the ability to acquire new skills, seek new employment, and manage the period in-between jobs more critical for every social class. Henry Farber, for example, finds that “[b]y virtually any measure, more recent cohorts of workers have been with their current employers for less time at specific ages.”²²⁶ He concludes the drop in long-term employment for men has been dramatic.²²⁷

Comprehensive consideration of the life paths of young men in their late teens and early twenties should consider the affordability of higher education, the process of job related skill acquisition and training, and the role of institutions such as the military and universal service. Perhaps, as critically, there should be reconsideration of the widespread use of imprisonment, given its counterproductive consequences, for relatively minor offenses. One of the most telling aspects of the change in pathways to adulthood is the greater importance of parental resources in subsidizing and cushioning the more complex entry of young men into the labor force.²²⁸ The lack of resources for those whose parents cannot assist increases the number of young men who fall by the wayside, aggravating in turn the prospects for family formation by the young women with whom they become involved. The best hope for their children is a strategy that increases the resources available for investment in the next generation.

IV. 25: THE AGE OF AUTONOMY?

Consideration of the growing scientific understanding of brain development need not, in itself, dictate any particular laws or policies. Instead, it enriches and informs our understanding of the effect of societal changes on different groups at different ages. This article has attempted to integrate the neuroscience evidence that establishes early adulthood as a distinct period of human development with the social science literature on class-based differences in the

226. Farber, *supra* note 216, at 2.

227. *Id.* at 23.

228. For a comprehensive examination of this issue, see Lisa Bell et al., *Failure to Launch: Cross-National Trends in the Transition to Economic Independence*, in *THE PRICE OF INDEPENDENCE: THE ECONOMICS OF EARLY ADULTHOOD*, *supra* note 216.

pathways to adulthood. The article demonstrates, in particular, that family formation for different socioeconomic and racial groups falls on different sides of the age of maturity, and this in turn exacerbates class-based vulnerabilities that contribute to growing inequality in the United States. It ends with a final question that unites the two parts of that analysis: if fully independent decision-making is unlikely before the mid-twenties, what is the best way to guide the transition through the years likely to shape adult prospects and potential? The middle class answer is to defer critical life choices until after the effective age of autonomy, but then to permit much greater tolerance and corresponding less institutional support for the results.²²⁹ That model, at a time of declining public and private support for those ready to begin adulthood in their early twenties, has been disastrous for those who lack access to middle class resources.

In understanding these developments and the possible responses to them, two particular areas deserve special consideration. First, this article suggests heightened attention to the political developments that have frustrated more effective policy responses. All groups have been affected by the combination of the changing economy, and men's and women's roles within it. Nonetheless, while the secular middle class has effectively adapted in ways that enhance the class position and material advantages of college educated women and their offspring, these changes have been particularly threatening to traditionalists who continue to condemn non-marital sexuality as "sinful" and celebrate marriage as a sacred institution designed to unite sexuality, reproduction and child-bearing.²³⁰ For this group, the increases in divorce and non-marital childbirth have provoked a sense of crisis, one heightened by the generational divisions between the deeply religious and their young adult children.²³¹ These views, though, are not shared by the

229. The critical support middle class parents provide, of course, is assistance in reaching the age of autonomy. For thirty-somethings entering marriage and having children, parental guidance takes on an entirely different meaning than it does for a twenty-year-old.

230. See LUKER, *supra* note 153, at 154-55.

231. For more comprehensive examination of these developments, see Barbara Dafoe Whitehead, *The Changing Pathway to Marriage: Trends in*

majority of Americans. A Gallup poll indicates that 55% of all Americans, and 75% of those between eighteen and twenty-nine agree that “premarital sex is not wrong.”²³² Nonetheless, as the debates over welfare reform, abstinence education, contraception and abortion illustrate, an activist minority has succeeded in using the political process to undercut assistance for the most vulnerable Americans. The results are particularly cynical. The middle class, which has the political clout to defeat more radical changes, has been largely unaffected by the lesser support for access to birth control and abortion.²³³ Wholesale cutbacks and their disproportionate impact on low-income women remain virtually invisible to much of the electorate. Conservatives can accordingly satisfy their fundamentalist “base” without paying a political price among moderates. In the process, however, the state has used the language of “moral values” to implement policies that reinforce the moral commitments of some groups at the expense of attention to the needs and circumstances of lower-income Americans.

The second issue involves reconsideration of the basis for protection of class interests within modern democracies. The *Carolene Products*²³⁴ footnote, often heralded as the clarion call of the post-War War II enforcement of civil rights, established the courts as the watchdogs guarding over measures that disadvantaged “insular minorities” and other unpopular groups.²³⁵ Today, that part of the judicial role has

Dating, First Unions, and Marriage among Young Adults, in FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE 168 (Steven M. Tipton & John Witte Jr. eds., 2005).

232. Frank Newport, Editor-in-Chief, The Gallup Poll, *Gallup Poll Review From The Poll Editors: Sexual Norms: Where Does America Stand Today?* THE GALLUP POLL, Dec. 1997, <http://www.hi-ho.ne.jp/taku77/refer/sexnorm.htm>. Moreover, 2002 data indicate that by age twenty, 77% of respondents had had sex, and 75% had premarital sex. By age forty-four, 95% of respondents (94% of women, 96% of men, and 97% of those who had ever had sex) had had premarital sex. Even among those who abstained until at least age twenty, 81% had had premarital sex by age forty-four. Finer concludes that “[a]lmost all Americans have sex before marrying.” Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954-2003*, 122 PUB. HEALTH REP. 73, 76 (2007).

233. See *supra* text accompanying notes 184-207 (indicating that the middle class has become more likely to rely on contraception than abortion, while poorer women have become more dependent on abortion as access to contraception has become more difficult).

234. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 fn.4 (1938).

235. *Id.*

been challenged both from the right, which rejects the substance of such rights-based protection, and the left, which distrusts the capability of the judiciary to command support for broad-based rulings such as *Roe v. Wade*.²³⁶

Simple rights analysis, of the type that affirmed women's rights to access to contraception and abortion,²³⁷ accordingly holds little promise. Two developments, in particular, hamstring a more active judicial role on these issues. The first is the move in the United States toward recognition only of those rights that limit government power (negative rights or liberties), rather than positive rights that compel government action.²³⁸ In the context of reproductive liberty, this distinction has served to reinforce the class-based nature of access to contraception and abortion. David Garrow emphasizes that this division was true both before and after the Supreme Court's decision in *Roe*.²³⁹

The second is the challenge to the judicial authority to compel consensus-based support for social action. Legal scholars have questioned both the propriety of judicial leadership on policy issues²⁴⁰ and queried whether decisions too far ahead of popular consensus simply provoke backlash that undermines the authority of the courts.²⁴¹

236. *Roe v. Wade*, 410 U.S. 113 (1973). For a summary of these developments, see Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

237. See, e.g., *id.* at 373; *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

238. For the original articulation of the distinction, see ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY*, reprinted in ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 118 (Henry Hardy ed., Oxford Univ. Press 1996) (1958). For a more recent defense of positive constitutionalism, see generally SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* (2003). This article, however, takes no position on the wisdom of positive rights claims, such as those which might recognize an enforceable right to funding necessary to realize contraception or abortion. See, e.g., the cases upholding the Hyde Amendment's refusal to fund abortions for poor women, *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

239. See David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 834 (1999) (emphasizing that middle-class women with resources and contacts had ready access to abortion before *Roe*, while poorer women did not); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 418-21 (Univ. of Cal. Press 1998) (1994).

240. For reservations about the judicial role, see, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 54 (1999).

241. See, e.g., William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279,

This article maintains that, in the context of class-based changes in family formation, the primary problem is not the ability to enforce any particular right, however much greater access to contraception, for example, might help. Instead, the problem lies in the lack of access to the agenda creating mechanisms for the assertion of moral authority. Recreating support for the transition to adulthood cannot occur so long as the source of the problem is invisible. Tonya Brito comes close to capturing this sense of powerless when she maintains that the lack of compelling symbolism has made it "difficult to win broad-based political support for progressive welfare reform proposals, including universal programs that aim to benefit all low-income families."²⁴² I have argued elsewhere that the culture wars at the core of the dispute over sexuality are so intense because they involve struggle over the articulation of the ideal to govern socialization of the next generation.²⁴³

The question then becomes how do we express "the values that concern us and bind us together,"²⁴⁴ and most critically, how do we do so in the face of deep divisions about what those values are? We certainly cannot do so if the representatives of the groups most deeply affected are not included in the process. Welfare reform provides a telling example of legislative reform, with far ranging effects, in which only one side in the culture war—the marriage proponents—meaningfully participated in shaping the symbolism of the venture, and the group most directly affected lacked even a surrogate voice in the process.

1326 (2005).

242. Brito, *supra* note 167, at 416.

243. See June Carbone, *Autonomy to Choose What Constitutes Family: Oxymoron or Basic Right?*, in *AUTONOMY IN THE LAW* 22 (Mortimer Sellers ed., 2007).

244. Robert Nozick, a libertarian advocate of a minimalist state, came to the conclusion that:

Within the operations of democratic institutions, too, we want expressions of the values that concern us and bind us together. The libertarian position I once propounded now seems to me seriously inadequate, in part because it did not fully knit the humane considerations and joint cooperative activities it left room for more closely into its fabric. It neglected the symbolic importance of an official political concern with issues or problems, as a way of marking their importance or urgency, and hence of expressing, intensifying, channeling, encouraging, and validating our private actions and concerns toward them.

ROBERT NOZICK, *THE EXAMINED LIFE* 286-87 (1989).

Instead, the challenge must center on how to make the values of the information economy more universal. Those values place a primary emphasis on the exercise of autonomy made possible by the postponement of critical life choices until after the age of full emotional maturity. The middle class achieves that autonomy by investment in the education and independence of its offspring. College dorms, subsidized internships, and shared living arrangements provide guidance in realizing a measure of independence. An array of friendships permits exploration of the meaning of companionship and negotiation of the basis for gender roles. At the same time, more permanent choices of a spouse, a career, and children occur only after adulthood has been fully and meaningfully reached.

Historically, training for and realization of autonomy has been the exclusive preserve of elites. Working-class life has traditionally involved earlier assumption of adult roles, less choice, and greater coercion. The institutions that provided for stable working-class roles in the last half century, however, including marriage as a universal and the less-skilled manufacturing jobs of the last economic era, are largely gone. To the extent then that there is a transformative potential lurking, it is the role of women. Women's greater workforce opportunities open the door to greater autonomy in the selection of mates, and the advent of birth control and abortion plus protection from sexual coercion hold open the prospect of greater choice in the timing and number of children. Realization of that autonomy holds the key to greater investment in the next generation as a whole.