

# Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?

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## I. INTRODUCTION

Americans are talking more about marriage now than ever.<sup>1</sup> Although much of the recent discussion has been sparked by the Massachusetts Supreme Court's recognition of same-sex marriage, the discussions do not end there. They extend to foundational questions about the proper role of the state, if any, in supporting and promoting marriage between heterosexual adults.

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1. A search on Lexis-Nexis of four newspapers, the *N.Y. Times*, *Washington Post*, *L.A. Times* and the *Wall Street Journal Abstracts*, for articles with marriage in the headline in the last six months of 1994, 1999 and 2004 yielded 100 documents in 1994, 104 in 1999 and 241 in 2004.

Three decades ago, it would have been inconceivable for people to discuss seriously the idea of withdrawing the legal and financial support society gives to marriage.<sup>2</sup> In recent years, however, we have seen more serious thought about this possibility. Once exclusively the grist of arcane law reviews and little-read policy journals,<sup>3</sup> the popular press is now exploring the merits of scrapping marriage as a category entitled to the state's support.<sup>4</sup>

At the same time that some are seriously considering removing the state from marriage, the state itself continues to actively promote marriage, especially among the poor.<sup>5</sup> Although the state has for a long time heaped tax, inheritance and social security benefit advantages upon married couples,<sup>6</sup> the state's support of marriage has recently extended

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2. The extent of the state's support or penalty of marriage is the subject of some debate and confusion. See, e.g., Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 141 (2003) (estimating that "[t]he federal government alone—not to mention the dozens of state governments that follow similar policies—spends or declines to collect billions of dollars each year because of its recognition of marriage"); Leslie A. Whittington & James Alm, *Tax Reductions, Tax Changes, and the Marriage Penalty*, 54 NAT'L TAX J. 455, 455 (2001); Edwin Chen, *Gore Favors Education Aid, End to 'Marriage Penalty'*, L.A. TIMES, July 31, 1999, at A11 (describing the marriage penalty).

3. See Bernstein, *supra* note 2, at 135 n.19 (citing Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905 (2001)); see, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228–30 (1995); Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996); Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207 (1988); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167, 176 (1999); Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283 (1997).

4. See, e.g., David Boaz, *Privatize Marriage*, SLATE (Apr. 25, 1997), <http://slate.msn.com/id/2440> ("Make it a private contract between two individuals."); Russell Smith, *Marriage: Who Needs It Anyway?*, GLOBE & MAIL, May 14, 2003, at R1 ("We don't issue legal certificates for confirmations, circumcisions or bar mitzvahs. Why not leave marriage to the churches and temples and covens? . . . Why does the government have to be involved at all?").

5. Stanley Kurtz, *Power of the President: Not to be Taken for Granted*, NAT'L REV. ONLINE, Apr. 10, 2002, [www.nationalreview.com/kurtz/kurtz041002.asp](http://www.nationalreview.com/kurtz/kurtz041002.asp) (noting the money in the "president's welfare plan . . . for programs that try to help those in poverty get married and stay together"); Letters to the Editor, *Revive Marriage To End Poverty?*, N.Y. TIMES, July 13, 1999, at A16.

6. Bernstein, *supra* note 2, at 141, 146, 149, 180. Bernstein catalogues the benefits that the state confers upon marital couples, including special treatment under estate and gift tax laws, exemptions from loss-gain valuations for property transfers between spouses, the ability to file joint tax returns, receipt of benefits granted to military spouses and spouses of civil service employees, evidentiary privileges, receipt of family medical leave from certain large employers, protection under state inheritance, community property and deferred community property laws, standing to recover for loss

to voluntary marriage education programs.<sup>7</sup> Although the Department of Health & Human Services “Healthy Marriage Initiative” concerns thinkers on both sides of the political spectrum,<sup>8</sup> it is hardly the federal government’s first foray into marriage promotion. The Clinton Administration’s welfare reform legislation purported to promote marriage, reduce nonmarital pregnancies, and encourage and stabilize two-parent families.<sup>9</sup>

Obviously, one important consideration for keeping or scrapping the state’s support of marriage concerns whether marriage matters to the way in which parents protect and invest in children.<sup>10</sup> Clearly, if

of consortium, ability to hold property in a tenancy by the entirety and other state-level benefits. *Id.*

7. U.S. DEP’T OF HEALTH AND HUMAN SERVS. ADMIN. FOR CHILDREN AND FAMILIES, ACF HEALTHY MARRIAGE INITIATIVE MISSION STATEMENT (2005), <http://www.acf.hhs.gov/healthymarriage/about/mission.html>.

8. See Jonah Goldberg, *No Angels: Justifying the Welfare State by Demand is a Sure Way to Keep it Around Forever*, NAT’L REV. ONLINE (July 23, 2004), [www.nationalreview.com/goldberg/goldberg200407230847.asp](http://www.nationalreview.com/goldberg/goldberg200407230847.asp) (opining that “a government that provides [marriage support] services . . . is a government that reserves the right to take as much of my property and wealth as it deems necessary to meet the demands of somebody else”); Kurtz, *supra* note 5 (describing opposition by the National Organization for Women and Planned Parenthood).

Defending the Healthy Marriage Initiative against conservative critics, the Assistant Secretary of the U.S. Department of Health and Human Services, Wade Horn, explained that “children (and adults) living in healthy and stable marriages are less in need of government services.” Wade Horn, Letter to the Editor, *Wade Horn Reads the Corner*, NAT’L REV. ONLINE (July 22, 2004), [www.nationalreview.com/letters/letters200407220856.asp](http://www.nationalreview.com/letters/letters200407220856.asp). The Healthy Marriage Initiative also has its defenders outside the government, sometimes from unlikely corners. See Editorial, *The Left’s Marriage Problem*, WASH. POST, Apr. 5, 2002, at A22.

9. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2110, 2113 (1996) (codified as amended in scattered sections of 7, 8, 21, 25, and 42 U.S.C.). The Clinton Administration also authorized a number of state demonstration projects to promote marriage under Section 1115 of the Social Security Act, with little success. Two recent analyses of these projects “found little robust evidence that waivers were effective in reducing female headship of families.” John M. Fitzgerald & David C. Ribar, *Welfare Reform and Female Headship*, 41 DEMOGRAPHY 189, 209 (2004); see also Lisa A. Gennetian & Virginia Knox, *Staying Single: The Effects of Welfare Reform Policies on Marriage and Cohabitation*, (MDRC Next Generation Project, Working Paper No. 13, 2003) summary available at <http://www.mdrc.org/publications/373/overview.html> (finding in a meta-analysis no consistent effects of demonstration projects on marriage rates).

10. A second consideration concerns how well adults do in marital versus nonmarital relationships. See John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1020–21 (2001) (arguing that the new social science data documenting the long-term health and lifestyle benefits conferred by marriage support “a number of ancient and enduring teachings on the goods and goals of marriage that have undergirded the law and theology of the Western tradition”). Summarizing the literature, the Centers for Disease Control and Prevention reports that “[c]ompared with unmarried people, married men and women tend to have lower mortality, less risky behavior, more

“children living with their mother and a cohabiting partner are as well-off as those living with two married parents,”<sup>11</sup> marriage promotion efforts would make little sense, at least in terms of promoting child welfare. Conversely, if children in nuclear families outperform children in cohabiting households, *as a result of their parents’ decision to marry*, the state’s support of marriage takes on a more reasonable, less moralistic cast.

Over the last quarter-century, thinkers and policymakers have tried to mine the wealth of studies that now exist about family form for lessons that can be drawn from them. These studies almost invariably stack newer family structures up against the nuclear family.<sup>12</sup> Until very recently, the

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monitoring of health, more compliance with medical regimens, higher sexual frequency, more satisfaction with their sexual lives, more financial savings, and higher wages.” MATTHEW D. BRAMLETT & WILLIAM D. MOSHER, FIRST MARRIAGE DISSOLUTION, DIVORCE, AND REMARRIAGE: UNITED STATES CDC ADVANCE DATA, NO. 323, 1 (2001), available at <http://www.cdc.gov/nchs/data/ad/ad323.pdf>; see also LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000); Peter Cappelli et al., *It Pays to Value Family: Work and Family Tradeoffs Reconsidered*, 39 INDUS. REL. 175 (2000) (using longitudinal data to determine that men who place greater importance on marriage and family before entering the labor market earn more, and women who do the same do not suffer in terms of subsequent earnings); Megan M. Sweeney, *Two Decades of Family Change: The Shifting Economic Foundations of Marriage*, 67 AM. SOC. REV. 132 (2002) (finding that improvements in the earnings of both men and women increase the likelihood of entry into marriage). Whether marriage itself accounts for these positive benefits is also a hotly-contested subject. Bernstein argues that existing studies do “not demonstrate that *marriage* makes people better off.” Bernstein, *supra* note 2, at 159 (emphasis added). Because the studies are correlational, they can neither isolate the cause of positive effects nor eliminate selection effects. Bernstein, *supra* note 2, at 159. “[P]erhaps,” she explains,

individuals destined for health and wealth want to get married before they achieve success, have little trouble finding suitable partners, and smoothly stay married throughout their lives [while individuals] predisposed to illness and poverty, by contrast, may have trouble forming stable and harmonious relationships. It might be truer to say that such unfortunates are not married because they are unhealthy, rather than that they are unhealthy because they are not married.

Bernstein, *supra* note 2, at 159.

A more fundamental consideration involves the fairness of using “marriage” as the touchstone for state support of parenting when same-sex couples are excluded from marriage but can and do raise children. This subject has received the ample attention it deserves elsewhere. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996); JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004).

11. Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 213 (2003).

12. Nuclear family in this Article means a family in which the adults are married and rearing their biological children. Nuclear families are used as the benchmark in these studies not only because of normative suppositions, but because more than one-half of all children still grow up in such families. Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 879 (2003) (explaining why the nuclear family continues to be

problem with drawing lessons about marriage from existing studies is that they suffer from an apples and oranges phenomenon, comparing families that are so dissimilar that nothing meaningful can be said.<sup>13</sup>

This Article provides a critical appraisal of the studies of family structure and the extent to which they can assist us in isolating the impact of living in a marital home on a child's well-being. Part I describes the limitations of earlier studies of family structure. Part II examines a pair of studies published in 2003 that compare children's outcomes, and parental investments in children, in two types of married and unmarried households: those in which the child is a biological child of both adults and those in which the child is the biological child of only one. This pair of studies concludes, starkly, that marriage matters to how children thrive and to the extent to which their parents are willing to invest in them. One study uncovered a significant "marriage advantage"<sup>14</sup> in outcomes for adolescent children raised in married stepfamilies over those in unmarried households, while the second found that married fathers make greater investments in their biological children than unmarried, biological fathers do. Part III then evaluates the degree of reliance we should place in these new studies. Specifically, it asks whether "marriage makes people good or do good people marry?"<sup>15</sup> It identifies various selection effects that can color the study results. It then suggests that the transformative power of marriage may lie first in the greater permanence of marital relationships and, secondarily, in the motivation of the parties to invest in their relationships. Perceptions of enduringness shape not only the relationship between the adults, but spill over into and frame the adults' relationships to their children. Part IV ends with several observations and cautions about marriage promotion efforts.

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the "basic starting point" for family structure comparisons); William Marsiglio, *When Stepfathers Claim Stepchildren: A Conceptual Analysis*, 66 J. MARRIAGE & FAM. 22, 22 (2004) (describing biological relatedness as the "normative model" for the parent-child relationship against which other family forms are measured).

13. See *infra* Part I.

14. Manning & Lamb, *supra* note 12, at 890.

15. Kimberly A. Yuracko, *Does Marriage Make People Good or Do Good People Marry?*, 42 SAN DIEGO L. REV. 889 (2005).

## I. THE LIMITATIONS OF TRADITIONAL STUDIES OF FAMILY STRUCTURE

Families take a multiplicity of forms today. In making comparisons among them, it is helpful to break family structures down along at least three axes: (1) co-residence; (2) biology; and (3) marriage.<sup>16</sup> As Figure 1 illustrates, stepfamilies and cohabiting families include a co-resident of the biological parent, unlike single parent households.<sup>17</sup> Both parents in two-biological parent, marital homes (the “nuclear family”) have a biological connection to a child with whom they live that is not present for both parents in stepfamilies.<sup>18</sup> Cohabitants are not married<sup>19</sup> and sometimes both have a biological tie to a child in the household, but not always.<sup>20</sup>

In virtually every comparison done to date, children in nuclear families fare better on average than other children,<sup>21</sup> along almost every

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16. As a result of rapid changes in family structure and composition, family law “is unfortunately afflicted with significant semantical problems, described . . . as a ‘frightful lack of linguistic uniformity.’” *Taylor v. Taylor*, 508 A.2d 964, 966 (Md. 1986) (quoting David J. Miller, *Joint Custody*, 13 FAM. L.Q. 345, 376 (1979)). Consequently, some ground rules for names are in order, which are explained in the next few notes.

17. Studies that compare children in single parent households versus those in nuclear families compare boxes 1 and 6 in Figure 1. *See infra* fig.1.

18. This Article uses the term “stepfamily” to mean those in which a child lives with one biological parent and the parent’s married partner. Studies that compare children in stepparent households against those in nuclear families compare boxes 1 and 2 in Figure 1. *See infra* fig.1.

19. Studies that compare children in cohabiting families against those in nuclear families compare boxes 1 and 3 in Figure 1. *See infra* fig.1.

20. Where a child lives with his or her parent’s unmarried partner, box 4 in Figure 1, this Article labels this a “mother’s partner” household based on the fact that most cohabiting children live with their mother and her partner. *See infra* fig.1; Manning & Lamb, *supra* note 12, at 877. This household arrangement is to be expected. The vast majority of nonmarital children and children after divorce live with their mothers. *See* U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS, tbl.C2, at 1 (2003), available at <http://www.census.gov/population/socdemo/hh-fam/cps2003/tabC2-all.pdf> (finding that approximately 16.8 million children live with mother only versus approximately 3.3 million living with father only; thus, of children who live with one biological parent only, 83% live with a mother); U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS, tbl.FG6, at 1 (2004), available at <http://www.census.gov/population/socdemo/hh-fam/cps2003/tabFG6-all-1.pdf> (documenting that of all one-parent family groups, approximately 2.3 million households are maintained by father versus approximately 10.1 million are maintained by mother). In single parent homes where the couple never married, the disparity is even slightly greater: 852,000 maintained by father versus approximately 4.4 million maintained by mother. *Id.*

21. *See* Fitzgerald & Ribar, *supra* note 9, at 191 (noting that “schooling and other developmental outcomes for children in single-parent families are also typically worse than in two-parent families”); Manning & Lamb, *supra* note 12, at 879 (noting the “vast literature that supports the relative strength of the married, two-biological-parent family”); Witte, Jr., *supra* note 10, at 1020 (“Most children reared in two-parent households perform better in their socialization, education, and development than their peers reared in single-, or no-parent homes.”); *cf.* JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 111–12 (2000) (surveying evidence and observing that “even single mothers’ staunchest defenders argue that, given the

index.<sup>22</sup> Some disagreement exists about the strength of the traditional studies showing that children in nonnuclear families have poorer outcomes.<sup>23</sup> More fundamentally, however, it is not clear to what we can attribute such shortfalls.<sup>24</sup> While some have wanted to draw firm conclusions from comparisons between outcomes for children in single parent and nuclear families,<sup>25</sup> such comparisons cannot be fairly made

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disadvantages of single parenthood, it would be remarkable if children in two-parent families did not enjoy advantages”).

Although the evidence showing that children do better in nuclear families is overwhelming, it is not monolithic. *See, e.g.*, Elizabeth C. Cooksey, *Consequences of Young Mothers' Marital Histories for Children's Cognitive Development*, 59 J. MARRIAGE & FAM. 245, 245–62 (1997) (finding among low-income Black families that children from single-parent homes do better in school than those in two-parent homes). Some empirical research also suggests that children living in multigenerational households fare as well as those in nuclear families, although this research is equivocal. *Compare* Thomas Deleire & Ariel Kalil, *Good Things Come In Threes: Single-Parent Multigenerational Family Structure and Adolescent Adjustment*, 39 DEMOGRAPHY 393, 393–413 (2002) (finding that while youth in nonmarried families generally fared more poorly than youths in married parent families, children in multigenerational households comprised a notable exception, whether the child's mother was never married or previously divorced) *with* Martha S. Hill et al., *Childhood Family Structure and Young Adult Behaviors*, 14 J. POPULATION ECON. 271, 271–99 (2001) (concluding that “there is no evidence that the number of adults in the child's home, per se, reduces detrimental influences of exposure to a non-intact family”).

22. The one notable exception to this trend is parental investment in adoptive children. *See* Robin Fretwell Wilson, *Uncovering the Rationale for Requiring Infertility in Surrogacy Arrangements*, 29 AM. J.L. & MED. 337 (2003). Evidence shows that adoptive parents invest more in adoptive children, on average, than biological parents do in their children. *Id.* The difference may be due to screening of adoptive parents by placement agencies, together with the greater commitment of adoptive parents, on the whole, to childrearing. *Id.* The small number of adoptive families has resulted in only a handful of empirical studies, making the observations about greater investment by adoptive parents preliminary.

23. Manning & Lamb, *supra* note 12, at 879 (faulting older studies of cohabiting families for “limited samples,” often restricted to children after divorce, and a “narrow range of covariates,” generally limited to socioeconomic indicators like gender, parental education and poverty, and for failing to include essential factors like family stability and the adults' relationship quality).

24. As June Carbone observes about poorer outcomes for children in single parent households, the “controversial question” is not if they occur, but “why.” CARBONE, *supra* note 21, at 112. After parsing the contributions of race, poverty and income, she concludes that greater economic, social and emotional resources in two-parent families—rather than the indispensability of the biological father and mother—explain the differences. *Id.* at 118. Parental involvement and supervision play a role, accounting “for over half of the differences in high school dropout and early childbearing rates, and all of the difference in idleness among boys,” as do weaker community connections. *Id.* at 114.

25. *See, e.g.*, DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND

on the basis of these older studies. Obviously, nuclear families differ from single parent families in that nuclear families enjoy a second pair of hands that single parents do not.<sup>26</sup> Nuclear families also tend to be wealthier,<sup>27</sup> less mobile, have more education, and have greater social support.<sup>28</sup> They differ in countless ways. Thus, studies of outcomes for children by family type suffer from an obvious limitation: a poorer outcome may be due to family form, but it may also be the result of other factors. As Bernstein fittingly observes, “Marriage may not deserve the credit for the welfare effects that often accompany being married.”<sup>29</sup>

Others have wanted to mine the many studies on stepfamilies for lessons about family structure and child well-being, which encounters an obvious problem if what one wants to weigh in about is marriage, because marriage is present in both these relationships. Moreover, many stepfamilies result from second marriages of one or both adults.<sup>30</sup> At best, stepfamilies can shed light on the value of first marriages not being disrupted.

More fundamentally, stepfamily comparisons suffer from the same apples and oranges problem that single parent family comparisons do. Children in stepfamilies have often experienced the dislocation of divorce and, perhaps, the conflict that preceded it.<sup>31</sup> Furthermore, they have made family transitions that a child in a nuclear family has not<sup>32</sup> and may have experienced lost or strained relationships with a biological

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SOCIETY 14 (1996) (“The decline of fatherhood and marriage cuts at the heart of the kind of environment considered ideal for childrearing. Such an environment, according to a substantial body of knowledge, consists of an enduring two-parent family . . .”).

26. See, e.g., Manning & Lamb, *supra* note 12, at 876 (“Marital status acts as an indicator of the potential number of caretakers . . .”). This second pair of hands brings not only income into the household, but also “social controls” and the benefits of co-parenting. *Id.* at 876.

27. Fitzgerald & Ribar, *supra* note 9, at 191 (noting that “[p]overty rates and dependence on welfare are much higher, on average, for single-parent families than for two-parent families”).

28. Manning & Lamb, *supra* note 12, at 877–78.

29. Bernstein, *supra* note 2, at 159.

30. Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 279 (2001).

31. *Id.* at 279 (noting that “the twin forces of family break-up and family nonformation drive the increasing number of children living” in stepfamilies). Not surprisingly, the more times a mother has married, “the higher the incidence of problem behaviors” for teens in stepfamilies. Manning & Lamb, *supra* note 12, at 888.

32. Hill et al., *supra* note 21, at 274 (identifying “change in family life as the central cause of family structure effects on children”); see also Frank F. Furstenberg, Jr. & Christine Winqvist Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. MARRIAGE & FAM. 893, 893 (1985) (describing the “conjugal succession” of divorced parents into and out of successive marriages).

parent.<sup>33</sup> A host of other differences may account for poorer outcomes. Although norms for appropriate parenting in stepfamilies were at one time less well developed,<sup>34</sup> it now appears that stepparents are *expected* by their partners to do less caretaking than biological parents expect each other to do.<sup>35</sup> Fathers in stepfamilies tend to be younger than biological fathers<sup>36</sup> and have lived with the children for shorter periods of time.<sup>37</sup> Stepmothers experience more resistance than other parents.<sup>38</sup> Additionally, stepfamilies have less wealth.<sup>39</sup> For this reason, commentators argue that the “real culprits in children’s lives are persistent poverty, conflict, neglect, abuse, and abandonment, not parental divorce.”<sup>40</sup>

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33. Scarring due to the loss of one or both biological parents is a common explanation of poorer outcomes for stepchildren. See Anne Case et al., *Educational Attainment of Siblings in Stepfamilies*, 22 *EVOLUTION & HUM. BEHAV.* 269, 275 (2001) [hereinafter *Educational Attainment*].

34. Andrew Cherlin, *Remarriage as an Incomplete Institution*, 84 *AM. J. SOC.* 634, 634 (1978) (describing ambiguity in the stepparent relationship and concluding that stepfamilies are “incomplete[ly] institutionaliz[ed]”); Marsiglio, *supra* note 12, at 22 (observing that “[s]tepfamilies, as an abstract institutional arrangement, are often fraught with uncertainties about “family” norms”).

35. For instance, biological mothers expect stepfathers to emotionally support them, be friendly to their children, and provide financial support for the family. They do not expect stepfathers to be the primary disciplinarian for their biological child. See Mark A. Fine, Marilyn Coleman & Lawrence H. Ganong, *A Social Constructionist Multi-Method Approach to Understanding the Stepparent Role*, in *COPING WITH DIVORCE, SINGLE PARENTING, AND REMARRIAGE* 273 (E. Mavis Hetherington ed., 1999). Consistent with this, stepfathers monitor their stepchildren less than biological fathers do. E. Mavis Hetherington & Kathleen M. Jodl, *Stepfamilies as Settings for Child Development*, in *STEPFAMILIES: WHO BENEFITS? WHO DOES NOT?* 55 (Alan Booth & Judy Dunn eds., 1994).

36. Hofferth & Anderson, *supra* note 11, at 221.

37. *Id.* at 221 (reporting that children in nuclear families had lived with their father for 99% of their lifetimes, while stepchildren on average lived 46% of their lives with their stepfather).

38. See, e.g., Samuel Vuchinich et al., *Parent-Child Interaction and Gender Differences in Early Adolescents’ Adaptation to Stepfamilies*, 27 *DEVELOPMENTAL PSYCHOL.* 618, 623–24 (1991).

39. Wendy D. Manning & Daniel T. Lichter, *Parental Cohabitation and Children’s Economic Well-Being*, 58 *J. MARRIAGE & FAM.* 998, 1001 (1996).

40. Katherine R. Allen, *The Dispassionate Discourse of Children’s Adjustment to Divorce*, 55 *J. MARRIAGE & FAM.* 46, 48 (1993).

With the rise of cohabiting families<sup>41</sup> in which children are raised,<sup>42</sup> we now have a better assay for evaluating the significance of marriage. New studies now compare outcomes for, and parental investment in, children in families that share co-residence and sometimes biology, but not marriage. In 1999, one in twenty children lived with a cohabiting parent,<sup>43</sup> a figure that is predicted to grow dramatically in our lifetimes. Two of every five children will live at some point in a cohabiting family.<sup>44</sup> Children born in the early 1990s will spend almost a tenth of their lives living with a parent and his or her unmarried partner.<sup>45</sup>

The next Part examines in detail a pair of these studies that bring us as close as we have come to date to an apples-to-apples comparison. Arguably, these studies do as much as social science can to isolate and quantify the value of marriage for children. The two studies are significant because “research on the implications of cohabitation for children’s lives [has been] relatively sparse” until now, despite the number of children impacted by cohabitation.<sup>46</sup>

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41. See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligations*, 52 UCLA L. REV. 815, 817 n.1 (2005) (reporting that “[t]he incidence of cohabitation has increased dramatically over the past thirty years. Between 1970 and 2000, the number of unmarried-cohabitant households in the United States rose almost ten-fold, from 523,000 to 4,880,000”). Much of the increase in the incidence of cohabiting households has come in recent years. Between 1990 and 1997, the number of cohabiting couples ballooned nearly 50%. Lynne M. Casper & Philip N. Cohen, *How Does POSSLO measure up? Historical Estimates of Cohabitation*, 37 DEMOGRAPHY 237, 239 tbl.1 (2000). Today, half of all women in the U.S. who are or have been married, have cohabited at some point. Bramlett & Mosher, *supra* note 10, at 4 (reporting that “62% of [U.S.] women have ever been married, half of whom have ever cohabited”). An increasing number of adults have rejected marital relationships entirely. Bramlett & Mosher, *supra* note 10, at 4 (reporting that 10% of U.S. women have cohabited but never married).

42. Over 40% of cohabiting couples live with children in the household. JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS, CURRENT POPULATION REP. P20-537, at 13 (2001), *available at* <http://www.census.gov/prod/2001pubs/p20-537.pdf>. Approximately one in four cohabiting couples shares a biological child. Hofferth & Anderson, *supra* note 11, at 213.

43. Gregory Acs & Sandi Nelson, “Honey, I’m Home.” *Changes in Living Arrangements in the Late 1990s* B-38 NEW FEDERALISM 1, 2 (June 2001), *available at* [http://www.urban.org/UploadedPDF/anf\\_b38.pdf](http://www.urban.org/UploadedPDF/anf_b38.pdf) (noting that 5.6% of America’s children live in cohabiting families). By comparison, in 1990, 2.2 million children in the U.S. lived with a biological parent and the parent’s unmarried partner. Hofferth & Anderson, *supra* note 11, at 213.

44. Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the United States*, 54 POPULATION STUD. 29 *passim* (2000) [hereinafter *Trends*]. Just ten years ago, the same demographer estimated that 30% of all children will spend some time in a cohabiting household. See Larry L. Bumpass et al., *The Changing Character of Stepfamilies: Implications of Cohabitation and Nonmarital Childbearing* 32 Demography 425 (1995) [hereinafter *Changing Character*].

45. Manning & Lamb, *supra* note 12, at 877.

46. *Id.* at 876.

## II. ISOLATING THE VALUE OF MARRIAGE FOR CHILDREN: A PAIR OF STUDIES

Recognizing that much of the research to date on child well-being in cohabiting families “confounds the effects of marriage and living with two biological parents” by making comparisons to children in nuclear families,<sup>47</sup> two recent studies have endeavored to provide more meaningful comparisons. These studies use very different analytical tools. The first study, by Manning and Lamb, evaluates outcomes for children in nonmarital households.<sup>48</sup> The second study, by Hofferth and Anderson, avoids the limitations of outcome studies<sup>49</sup> by examining differential investments in marital and nonmarital children by biological fathers. As a pair, these studies provide a valuable lens for assessing the relative importance of marriage for children’s welfare.

### *A. A Focus on Child Well-Being: The Manning & Lamb Study*

Manning and Lamb compared children living with their mother and her nonmarital partner to children in married stepfamilies.<sup>50</sup> They selected the latter as a “more appropriate comparison group” than nuclear families because stepfamilies and families containing a mother’s partner share co-residence and a nonbiological relationship between the child and one adult in the household.<sup>51</sup> More importantly for this Article, this comparison better isolates the importance of marriage between these two types of households.

Manning and Lamb’s study improves on older studies in four ways: by examining the particular family arrangement most children in cohabiting households find themselves in, living with only one biological parent; by using a range of well-being indicators rather than relying on one or

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47. *Id.* at 878.

48. *Id.* at 876 (discussing academic and behavioral outcomes).

49. *See infra* notes 69–71 and accompanying text (discussing limitations of outcome studies).

50. Manning and Lamb used the first wave of the National Longitudinal Adolescent Study of Adolescent Health. This database is drawn from interviews in 1995 of students in the seventh through twelfth grades, and their parents, from eighty high schools and fifty-two middle schools in the United States. Manning and Lamb utilized the “in-home interviews administered to 18,924 students with a response rate of 78.2%.” Manning & Lamb, *supra* note 12, at 880–81.

51. *Id.* at 878. Thus, Manning and Lamb compare outcomes for children in boxes 2 and 4 in Figure 1. *See infra* fig. 1.

two,<sup>52</sup> by controlling for “key variables that may explain some of the effects of family structure on child outcomes,” such as the child’s closeness to the child’s mother and nonresident father, monitoring, mother’s education and family income, and family stability; and by assessing adolescents.<sup>53</sup>

The results are telling. The study demonstrated a statistically significant difference in delinquency between children living with married parents, one of whom was a biological parent, and unmarried parents, one of whom was a biological parent. Teens in married stepfamilies were significantly less likely to be delinquent than teens living in unmarried, cohabiting households, with an odds ratio of -1.15.<sup>54</sup> Even after taking into account the parent’s relationship with the child, family stability, and socioeconomic characteristics, this “marriage advantage”<sup>55</sup> continued to be significant, although it ebbed to -.68.<sup>56</sup> Importantly, this difference is similar in degree to differences the researchers also found between stepchildren and children in nuclear families.<sup>57</sup>

Marriage between the adults also impacted a teen’s verbal ability as well, although the effect is only marginally significant once background factors are taken into account.<sup>58</sup> Teens in married stepfamilies scored higher on the vocabulary test than teens in families containing the mother’s partner at the bivariate level.<sup>59</sup> Although the inclusion of background variables shrinks the size of the effect,<sup>60</sup> “the family effect is marginally significant (p = .06).”<sup>61</sup>

Suspensions, expulsions, poor school performance and college expectations appeared initially also to differentiate children in marital and nonmarital homes, but differences receded with further analysis. In a bivariate analysis, teens in married stepfamilies were significantly less

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52. Manning and Lamb included “measures of Peabody Picture Vocabulary Tests, grades in school, and college expectations,” since “any one measure may suffer some shortcomings.” Manning & Lamb, *supra* note 12, at 880.

53. The researchers measured “parenting characteristics (closeness to mother and nonresident father, as well as monitoring); socioeconomic status (mother’s education and family income); and family stability (number of mother’s marriages and duration of relationship),” and controlled for race and ethnicity, mother’s age, child’s age and sex, number of children in the household, and importance of religion to the child. *Id.* at 881.

54. *Id.* at 887 tbl.4 (reporting p < .001).

55. *Id.* at 890.

56. *Id.* at 887 tbl.4 (reporting p < .05).

57. *Id.* at 886 tbl.3 (reporting an odds ratio in a bivariate analysis of .61, with p < .01).

58. *Id.* at 888, 889 tbl.5.

59. *Id.* at 889 tbl.5 (reporting odds of scoring higher among teens in stepfamilies as 4.21 (p < .001)).

60. *Id.* at 889 tbl.5 (finding in a multivariate analysis that the odds of a high vocabulary score among teens in stepfamilies is 1.65 (p = .06)).

61. *Id.* at 888.

likely to be suspended or expelled from school than teens living in unmarried, cohabiting households,<sup>62</sup> while the chances of other school problems for each was indistinguishable.<sup>63</sup> This difference in odds of expulsion or suspension receded when sociodemographic variables, closeness to mother, and monitoring were taken into account.<sup>64</sup> A multivariate analysis also washed out differences in the odds of earning low grades<sup>65</sup> and the child's college expectations<sup>66</sup> between teens in stepfamilies and those in cohabiting households.

Because differences in delinquency according to marital status (and to a lesser degree, verbal ability) continued to exist for children even after taking into account the parent's relationship with the child, family stability, and socioeconomic characteristics, it is more likely that marriage itself "create[s] the advantage experienced by children in married" stepfamilies.<sup>67</sup> Manning and Lamb conclude that although it does not exert an influence on every outcome they assessed, "[t]he marital status of men in stepfamilies appears to influence adolescent well-being."<sup>68</sup>

#### *B. A Focus on Parental Investment: The Hofferth and Anderson Study*

As noted above, studies of outcomes for children raise important questions of causation—a poorer outcome may be due to family form or to other factors that distinguish one type of family from another. For

62. *Id.* at 881, 887 tbl.4 (reporting that that teens in married households had lower odds, -.052, of being suspended or expelled than teens in unmarried, cohabiting families and this difference was significant at  $p < .001$ ).

63. *Id.* at 881, 887 tbl.4.

64. *Id.* (finding that teens living in unmarried, cohabiting families had slightly higher odds of being suspended or expelled from school (.21), but the difference was not statistically significant).

65. *Id.* at 889 tbl.5 (finding in a bivariate analysis that teens in stepfamilies are less likely to receive low grades than teens in cohabiting families, with an odds of -.38 ( $p < .05$ ), which shrank to -.11 after controlling for background factors).

66. *Id.* (reporting teens in stepfamilies are more likely to have college expectations, in a bivariate analysis (odds ratio of .13,  $p < .05$ ) than teens in cohabiting families, which recedes to .06 after inclusion of background factors).

67. *Id.* at 890.

68. *Id.* Other researchers have uncovered negative effects of parental cohabitation on a child's outcomes. *See, e.g.,* Acs & Nelson, *supra* note 43, at 6 ("[C]hildren living with cohabitating couples may not fare as well as children living with married biological parents."); Sandi Nelson et al, *Beyond the Two-Parent Family: How Teenagers Fare in Cohabiting Couple and Blended Families*, B-31 NEW FEDERALISM 1 (May 2001), available at [http://www.urban.org/UploadedPDF/anf\\_b31.pdf](http://www.urban.org/UploadedPDF/anf_b31.pdf) (reporting that "White and Hispanic teenagers living in mother/boyfriend cohabiting families fare worse, on average, than those living with single mothers.").

instance, in cohabiting families, differences in outcomes for children may be attributable to differences in income, the relative youth of the parents, higher levels of stress and conflict,<sup>69</sup> role confusion, or a lack of clear expectations about parenting in cohabiting households.<sup>70</sup> Unlike outcome studies, a focus on investment avoids the multitude of reasons that one child may not turn out as well as another, or why groups of children may fare better or worse than others on average.<sup>71</sup>

To address this concern, Hofferth and Anderson compared investments by residential fathers in children in four different types of families: the nuclear family (married, biological parents), the cohabiting family (unmarried, biological parents), the stepfamily (married parents, one of whom is a nonbiological parent), and unmarried parents, one of whom is a nonbiological parent (mother cohabits with live-in partner).<sup>72</sup> Data came from 2531 children and their parents and examined father's weekly hours engaged with the child;<sup>73</sup> weekly hours available to the child when the father was around but not actively participating in activities with the child;<sup>74</sup> fathering motivation; number of activities the father participated in with the child in the past month;<sup>75</sup> and "warmth" toward the child, as reported by fathers themselves.<sup>76</sup>

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69. Anne Case et al., *How Hungry is the Selfish Gene?*, 110 *ECON. J.* 781, 782 (2000) (making this observation about stepchildren versus children in nuclear families).

70. *Educational Attainment*, *supra* note 33 (making this observation about stepparent households).

71. Robin Fretwell Wilson, Book Review, 35 *FAM. L.Q.* 833 (2002) (reviewing JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* (2003)).

72. The researchers used the 1997 Child Development Supplement to the Panel Study of Income Dynamics. Hofferth & Anderson, *supra* note 11, at 218.

73. This figure was obtained using a time diary of the child's activities, as answered by the child and or the child's mother, including the question "[w]ho was doing the activity with [the] child?" *Id.* at 219. The diary captured one weekday and one weekend day. Figures for the weekday (multiplied by five) were added to the figure for the weekend day (multiplied by two) to arrive at a weekly figure. *Id.* at 220.

74. This was also accomplished using the time diary, with the additional question, "[w]ho else was there but not directly involved in the activity?" *Id.* at 219.

75. The researchers analyzed thirteen activities:

going to the store; washing or folding clothes; doing dishes; cleaning house; preparing food; looking at books or reading stories; doing arts and crafts; talking about the family; working on homework; building or repairing something; playing computer or video games; playing a board game, card game, or puzzle; and playing sports or outdoor activities.

*Id.* at 220. These questions were only asked with respect to children three years and older, with the result that the sample sizes are lowest for this variable.

76. The study measured warmth by the father's responses to six items: "how often in the past month the father hugged each child, expressed his love, spent time with child, joked or played with child, talked with child, and told child he appreciated what he or she did." *Id.*

Hofferth and Anderson concluded that married fathers invest more heavily in their biological children than unmarried biological fathers do. Before controlling for socioeconomic differences, Hofferth and Anderson found that unmarried biological fathers were statistically indistinguishable from married ones in the number of hours engaged with or available to the child, number of activities they do with the child, and their own self-reported warmth toward the child.<sup>77</sup> By these comparisons, marriage did not matter much at all.

However, when Hofferth and Anderson controlled for ways in which the two types of fathers might differ as groups, significant differences emerged. Unmarried biological fathers spent about four hours less a week on average with their biological children than married biological fathers, after controlling for race, father's age, child's gender and age, number of children, percentage of months lived with the father, father's work hours per week and earnings, and whether the father paid child support for children outside the house.<sup>78</sup> In fact, the data for unmarried cohabiting fathers looked more like stepfathers and mothers' partners than married biological fathers.<sup>79</sup> Fathers in the three non-nuclear families were statistically indistinguishable.<sup>80</sup>

While differences did not emerge for the second and third factors (hours available and number of activities per week),<sup>81</sup> when it came to warmth there again emerged measurable differences. Unmarried biological fathers rated themselves less warm toward their children than married

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77. *Id.* at 223. Specifically, married biological fathers spent 15.63 hours per week engaged with their child, compared to 14.62 hours for unmarried, biological fathers. Hours available were nearly identical between the two sets of fathers: 13.35 hours per week for married biological fathers and 13.29 hours per week for unmarried, biological fathers. Married biological fathers engaged in 9.13 activities with their biological child over the course of a month, while their unmarried counterparts engaged in 8.94 activities. Self reports of warmth for married biological fathers were slightly greater than for unmarried biological fathers, 5.10 and 4.91 respectively. *Id.* at 223, tbl.3. Hofferth and Anderson concluded from these initial comparisons that “[u]nmarried biological fathers spend no less time engaged with or available to children than married biological fathers.” *Id.* at 223.

78. *Id.* at 224, 225 tbl.5 (reporting that unmarried biological fathers spent 3.7 hours fewer per month engaged with their child than married fathers). This difference was statistically significant at a high level of confidence. *Id.* (giving p value of < .01).

79. *Id.* (noting that stepfathers, unmarried biological fathers and mother's partners all “spent significantly less time with fathers than children of married biological fathers, and . . . are not statistically different from each other”).

80. *Id.* at 224 & tbl.5.

81. *Id.* at 225–26 & tbl.5 (finding that unmarried biological fathers did as well as married ones in available time and number of activities per week).

biological fathers did.<sup>82</sup> The difference was statistically significant. As before, unmarried biological fathers looked more like stepfathers than married, biological fathers.<sup>83</sup>

Importantly, the biological child of cohabitants consistently received smaller investments from their fathers than a biological child of married parents, in both blended and nonblended households. In nonblended families, “children living with an unmarried biological father enjoy less direct engaged time and also experience less warmth than children of a married biological father.”<sup>84</sup> The differences persisted for biological children after controlling for other socioeconomic factors, even in blended families. For instance, married, biological fathers report being engaged with their biological children for 11.4 hours a month, compared to 7.0 for unmarried biological fathers.<sup>85</sup> Moreover, married, biological fathers rated their warmth as 4.9, while unmarried, biological fathers scored their warmth as 4.2 on average.<sup>86</sup>

Obviously, marriage is differentiating the investments fathers make in their children. Nonetheless, it could be that these observed differences still have nothing to do with marriage. That is, marriage may simply be exerting a selection effect, selecting for men that differ in some way that is important to the investment in children. To hone in on the impact that marriage itself is having, if any, Hofferth and Anderson compared two types of cohabiting families: (1) those with only biological children, and (2) those that are “blended,” that is, households that contain both nonbiological and biological children.<sup>87</sup> Blended families often provide a convenient way to eliminate lots of possible confounders—factors that distinguish nonmarried fathers from married ones in ways that could lead to their reduced investment in children, but that have nothing to do with marriage or the lack of marriage itself.<sup>88</sup>

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82. *Id.* (finding in a two parent, two child subsample that unmarried biological fathers score on warmth, of 4.4, differed significantly from married biological fathers’ scores of 5.1;  $p < .05$ ).

83. *Id.* at 225 tbl.5, 226–27, (reporting significant shortfalls on warmth for stepfathers of -1.11, married biological fathers of -0.63 and mother’s boyfriends of -1.27). Unfortunately, the authors do not indicate whether the difference was statistically indistinguishable.

84. *Id.* at 226 tbl.6, 228 (reporting number of hours engaged for married and unmarried fathers of 14.8 and 10.4, respectively, and warmth scores for married and unmarried fathers of 5.1 and 4.4, respectively; both differences are significant at  $p < .05$ ).

85. *Id.* (difference is significant at  $p < .05$ ).

86. *Id.* (difference is significant at  $p < .05$ ).

87. *Id.* at 226 tbl.6, 227.

88. Comparisons of investments by the same parent in biological and nonbiological children are useful for other reasons as well. They permit evaluation of the many reasons advanced for the shortfalls experienced by nonbiological children. Thus “[w]hile it is possible to chalk up differences” in outcomes for nonbiological children living in stepfamilies or cohabiting families to “parenting styles, income differences, community support or other external factors, it is much more difficult to explain away

Specifically, the analysis of blended families allows comparisons between biological and nonbiological children to be made for the same father.

Hofferth and Anderson analyzed blended families to discern whether a selection effect can explain the lower investment by unmarried fathers in their biological children.<sup>89</sup> Some speculate that for blended families, “negative selection” may be occurring, the idea being that male cohabitants are less desirable than the men who ultimately marry.<sup>90</sup> Because these men are less desirable, they must “settle” for a woman with children and “settle” for cohabiting.<sup>91</sup> Negative selection may occur on both sides of the gender equation. Just as a less desirable male may have to “settle” for a woman with a child, a woman with a child may also have to “settle” for a man who earns less or is otherwise less desirable as parenting material.<sup>92</sup> If this were so, one would expect to see cohabiting fathers in blended families doing less well both with both their nonbiological children *and* their biological ones.<sup>93</sup> A lower level of investment in various children by an unmarried parent would then reflect attributes of that parent rather than the impact of marriage.

Others argue that it is just as plausible that “positive selection” occurs in cohabiting families.<sup>94</sup> A woman with a child may be positively selecting a man to be the father of her next child based on his demonstrated parenting with the child she already has.<sup>95</sup> If this were so, then one would expect to see fathers in blended cohabiting families investing more heavily in both the biological and nonbiological children than fathers in nuclear families.<sup>96</sup>

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differences within the *same* family. The idea that a biological [parent] simply possesses a greater bag of parenting tricks or experiences than a non-biological [parent]” can be examined in mixed households where one individual wears two hats: biological parent and stepparent. Wilson, *supra* note 71, at 840. “Indeed, if [cohabiting fathers] were less skilled as parents or presided over more chaotic families, birth children [should] suffer along with the [nonbiological] children.” *Id.* Neither can “[i]ll-defined expectations” explain poorer outcomes for children in blended families, “since the same expectations would [presumably] affect biological and non-biological children alike.” *Id.*

89. In terms of Figure 1, this comparison examines and compares children in boxes 7 and 8. *See infra* fig.1.

90. Hofferth & Anderson, *supra* note 11, at 217.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 217–18.

Testing for just these selection effects, Hofferth and Anderson found evidence of negative selection. Cohabiting fathers are investing distinctly lower amounts of time in both their biological children and their partner's children, when compared to married fathers.<sup>97</sup> The shortfalls are true of warmth, too.<sup>98</sup> The authors are careful to warn, however, that these findings are “not definitive, because sample sizes are small for blended families and interactions could not be included,” although they do concede that the findings “[do] support[] the argument that marriage is more important than the biological relationship between father and child.”<sup>99</sup>

From all this evidence, Hofferth and Anderson distill a single insight: “[M]arriage per se confers advantage in terms of father involvement above and beyond the characteristics of the fathers themselves, whereas biology does not.”<sup>100</sup> Of course, the question remains whether marriage itself is producing these advantages, a question to which we now turn.

### III. QUESTIONS OF CAUSATION: IS MARRIAGE IMPROVING THE LIVES OF CHILDREN?

Because both biological and nonbiological children fare worse on certain measures in nonmarital households—and are invested in less by their fathers—across the studies,<sup>101</sup> it does appear that some feature

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97. *Id.* at 226 tbl.6, 227. With respect to biological children, married fathers spent 11.4 hours engaged with the child in the prior month, while unmarried fathers spent 7.0. *Id.* This difference was significant ( $p < .05$ ). *Id.* Similar shortfalls occurred for nonbiological children. Stepfathers spent 12 hours with their nonbiological children, while unmarried cohabiting fathers spent 9.0. *Id.*

98. Self-reports of warmth toward biological children for married fathers and unmarried fathers were 4.9 and 4.2, respectively. *Id.* (reporting difference at  $p < .05$ ). For nonbiological children, married stepfathers' scores for warmth were 5.1, compared to 3.6 for nonmarital fathers. *Id.* (reporting difference at  $p < .05$ ).

99. *Id.* at 228.

100. *Id.* at 230. Importantly, these differences persisted even after socioeconomic status was stripped away. Thus, differences attributable to family form add to and compound the wealth and educational advantages also experienced by children in marital households. See Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 11 (2000) (noting that “children already disadvantaged in terms of parental income and education are relatively more likely to experience” a cohabitational setting and “on average, cohabiting households tend to be less well-off financially than married-couple households”).

101. Other studies have also examined outcomes for children living in cohabiting households. In a 2001 study, Nelson, Clark and Acs found that teenagers in cohabiting settings were more likely than children in nuclear families not to get along with other children; to lie, cheat, be suspended or expelled from school; and to experience feelings of sadness and depression compared to those in married households. Nelson et al., *supra* note 68, at 3–5. According to the study, 3.6% of teens in married households exhibited these emotional and behavioral problems, in comparison to 10.0% of teens in cohabiting households. *Id.* at 3 tbl.1. The impact of living in a cohabiting household varied by race. For Black children, living in a cohabiting family was no better than living in a single parent household. *Id.* Among Whites and Hispanics, children fared slightly better in a

common to cohabitation accounts for the “negative consequences for children in this type of family structure.”<sup>102</sup> We should be cautious before accepting this conclusion at face value, however. As Professor Yuracko aptly points out, it may be that marriage has done little to improve the lives of these children.<sup>103</sup> Rather, adults who marry may share a set of characteristics that both make it more likely that the adult marries *and* that he or she performs well as a parent. The following discussion first examines possible selection effects and other reasons to be skeptical of the authors’ conclusion that marriage itself accounts for the observed differences. It then explores whether marriage is doing something that makes the adults act differently and in ways that affirmatively enhance the child’s welfare.

#### A. Alternative Explanations

Hofferth and Anderson and Manning and Lamb both conclude that parental investment and child well-being hinge in part on marriage. Although both studies significantly improve upon earlier studies of family form, limitations inherent in the study designs nonetheless make it difficult to conclude *definitively* that marriage improves children’s well-being.

As with any correlational study, it is not clear in which direction the causal arrow runs. Are men investing less because they cannot marry, or are they less marriageable because they invest less? To answer this, we need to know more about why cohabiting fathers and their partners choose to cohabit rather than marry and which party tends to drive the cohabitation decision.

Moreover, other factors that have little to do with marriage conceivably may account for the investment and outcome shortfalls for children.

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cohabiting household than in a single parent home. *Id.* Unfortunately, small sample sizes made it impossible to distinguish between children living with both an unmarried, biological father and those living with a unmarried, non-biological father. *Id.* at 5.

The researchers posited competing explanations for these behavioral differences. The poor behavior of children in cohabiting households may result from the presence of the cohabitant or, alternatively, a mother with a troubled teen child may “seek out a partner.” *Id.* Likewise, “differences in outcome for children living with a mother and . . . a stepfather [may be] related to the quality of the mother-partner relationship.” *Id.*

102. Manning & Lamb, *supra* note 12, at 880 (theorizing that if poorer outcomes persist for children in nonmarital households after a multivariate analysis, “such findings would indicate that some feature of cohabitation itself (that is, role ambiguity) may have negative consequences for children in this type of family structure”).

103. Yuracko, *supra* note 15, at 893–94.

Unmarried biological fathers were the most likely to have other children they supported in Hofferth and Anderson's study.<sup>104</sup> Although the researchers controlled for income, which removes this difference in part, finances are not the only social capital. Time and energy are finite. People have a finite number of hours in the day and may even have limited emotional capital, which for cohabiting biological fathers as a group, is being spread among a greater number of children, including children outside his present adult relationship.<sup>105</sup> Reduced investment by these fathers could reflect nothing more than the "loyalty conflicts" that fathers with children in multiple households often experience when deciding how much time to spend with each.<sup>106</sup> Future studies should assess whether the fathers who invest the least are those who are stretched thinnest between multiple children in multiple households.

Men in these households do not exist in a vacuum. They are affected by their partners and by the children themselves. Because maternal depression is more prevalent among cohabiting women,<sup>107</sup> we might well expect that these men are frazzled, taxed, or not nearly as content, which may impact the quality of their interaction with their children. Likewise, whether a child feels confident that a parent will always be there will certainly impact the quality of their interaction and, thus, the parent's investment in the child.<sup>108</sup> Children of cohabiting unions have good reason to worry about the long-term prospects of the adult-adult relationship, as the next subpart explains.

Selection bias may also play a role. The same dispositions and preferences that made a biological father reject marriage, or accept his partner's decision not to marry, may lead him to invest less in children of the union. Reduced investment then could reflect nothing more than a footloose and fancy-free mentality that trusts to fate. If this were a complete explanation, one would conclude that observed differences for children of cohabitants signify nothing more than, in Professor Yuracko's heuristic, "good people" marrying.<sup>109</sup> As the next subpart explores, however, marriage may exert a stronger influence than simply drawing in "better" parents. It may be that marriage fosters characteristics

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104. Hofferth & Anderson, *supra* note 11, at 221.

105. Manning & Lamb, *supra* note 12, at 880 (noting that "[t]he number of one's siblings is related negatively to academic achievement, presumably because more children in the household means parents possess fewer instrumental and emotional resources to invest in each child individually") (citations omitted).

106. Marsiglio, *supra* note 12, at 22.

107. Manning & Lamb, *supra* note 12, at 891.

108. See Marsiglio, *supra* note 12, at 37 ("stepchildren's fears about whether a stepfather will stick around . . . are likely to make a difference" to a man's tendency to claim a child as his own).

109. Yuracko, *supra* note 15, at 894.

in the adult relationship that have explanatory power for understanding the improvements in children's welfare.

*B. Reasons Marriage May Transform Adults' Relationships  
With Their Children*

The view that marriage might influence parenting has been disparaged.<sup>110</sup> Nonetheless, the observed differences in outcome and investment in nonmarital children may be due to real differences in parenting between marital and nonmarital couples. Dunifon and Kowaleski-Jones speculate that "parents in . . . cohabiting families may display lower levels of parental control and warmth in their parenting than those in married-couple families."<sup>111</sup> Clearly, "adult supervision and monitoring of children's behaviors [are] important means by which children are kept from engaging in problem behaviors."<sup>112</sup>

These parent-child interactions may express real differences in the relationship between the adults. Marriage tends to instill and bring along with it certain relational benefits for the adults, like permanence, commitment and even sexual fidelity, which redound to the benefit of children in the household, as the next subparts demonstrate.<sup>113</sup> This is not to say that one could not be monogamous or committed outside marriage or that a nonmarital relationship could not last for decades; a significant body of empirical evidence, however, suggests that this is not as likely to occur.

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110. Jaff, *supra* note 3, at 207–42 (discussing "assumptions [] we make regarding the ability and propriety of unmarried people as parents. Marital status is used as shorthand for the values associated with parenting . . . . The underlying notion seems to be that marriage instills values and capabilities associated with parenting in people who, before in the absence of the marriage ceremony, did not have those capabilities.").

111. Rachel Dunifon & Lori Kowaleksi-Jones, *Who's in the House? Race Difference in Cohabitation, Single Parenthood, and Child Development*, 73 *CHILD DEV.* 1249, 1252 (2002).

112. Hill et al., *supra* note 21, at 274.

113. See *infra* notes 153, 138–139, 140–41 and accompanying text (describing differences in norms of sexual fidelity, permanence and investment among spouses and cohabitants).

## 1. *The Importance of Permanence*

It is particularly instructive that “[c]ohabitation [is] a short-term status.”<sup>114</sup> Forty percent of cohabitants “end [their] relationship within five years” of moving in together.<sup>115</sup> “[O]nly about 10 percent of cohabitants who do not marry are still together five years later.”<sup>116</sup> More than one-third of children born into cohabiting unions will see their parents break up before age sixteen.<sup>117</sup> Children in cohabiting households often undergo “multiple family transitions” before reaching the age of eighteen,<sup>118</sup> as their biological parent moves into and out of successive relationships.<sup>119</sup> These children will spend a quarter of their childhood with a single parent, a quarter with a cohabiting parent, and less than half with married parents.<sup>120</sup>

For many fathers, the relationship to a child is coterminous with the father’s relationship with the child’s mother.<sup>121</sup> To the extent this is true for a given cohabiter, he may well expect that when he exits the relationship with his partner, he will be terminating or severely curtailing the parent-child relationship as well. It would be surprising, in fact, if the ongoing nature of the two relationships were not linked for cohabiting fathers. Many divorced fathers “neither see nor support their children in a systematic way,”<sup>122</sup> and never-married fathers are even less

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114. *Trends*, *supra* note 44, at 33. Children born into cohabiting unions experience the highest rate of disruption of their parent’s relationship, followed by children born into second marriages. *Id.* Children born into first marriages experience the least disruption. *Id.*

115. Smock, *supra* note 100, at 3 (“[C]ohabitation is a rather short-lived experience with most ending it either by terminating the relationship or by marrying within a few years.”).

116. Garrison, *supra* note 41, at 839. In comparison, “80 percent of first marriages survive at least five years and two-thirds survive for at least ten years.” *Id.*

117. *Trends*, *supra* note 44, at 37; *see also* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 59 tbl.65 (1998) (reporting that 59.1% of all women aged thirty-five to thirty-nine have had one husband or cohabiting partner, 21.6% have had two, 8.6% have had three, and 3.6% have had four or more).

118. *Changing Character?*, *supra* note 44, at 432.

119. *See id.* at 12–13; *Trends*, *supra* note 44, at 432–33.

120. *Trends*, *supra* note 44, at 38.

121. Marsiglio, *supra* note 12, at 22 (“In practical terms, the[] persistence [of the parent-child relationship] is usually contingent on men’s continued relationship with the birth mother.”).

122. Barbara Stark, *Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practice, Feminist Theory, and Family Law Doctrine*, 26 HOFSTRA L. REV. 293, n.395 (1997) (reviewing studies). It is difficult to overstate the extent to which the relationships between these children and their noncustodial fathers are disrupted following a divorce. More than 20% of children see their noncustodial fathers only a few times a year, or not at all. E. Mavis Hetherington et al., *What Matters? What Does Not? Five Perspectives on the Association Between Marital Transitions and Children’s Adjustment*, 53 AM. PSYCHOLOGIST 167, 172 (1998); *cf.* CHRISTINE WINQUIST NORD & NICHOLAS ZILL, U.S. DEP’T OF HEALTH & HUMAN SERVS., NON-CUSTODIAL PARENTS’ PARTICIPATION IN THEIR CHILDREN’S LIVES: EVIDENCE FROM THE SURVEY OF INCOME AND PROGRAM PARTICIPATION

involved as a group.<sup>123</sup> Divorced fathers are, presumably, biological fathers, suggesting that neither biology nor an earlier marriage is sufficient to moor fathers to their children once the adult relationship ends. This places a premium on relationships that are more enduring.

In the face of this precariousness, a father who dials back his investment in a child, whether biological or not, is acting rationally. If a man perceives himself to be in a short-term relationship, why would he invest in the child he produced if he will soon be exiting?<sup>124</sup>

## 2. *The Importance of Investment in the Adult Relationship*

Recent research suggests that the at-will nature of cohabiting relationships has far-reaching effects. Although many have argued that marriage is also an at-will relationship due to the availability of unilateral divorce, there are significantly fewer barriers to exit for cohabitants than for spouses. The nearly unfettered ability of cohabitants to terminate the relationship not only increases the likelihood of relationship failure by easing exit, it also fosters decreased investment in the adult relationship, which results in less satisfying relationships. In a self-fulfilling prophecy, these less fulfilling relationships further increase the chances of dissolution.

In the literature on divorce, two theories have been advanced to explain the link between dissolution and marital satisfaction. Exchange theory posits, in the context of marriage, that “people who adopt favorable attitudes toward divorce invest fewer resources in their marriages, thus eroding marital quality.”<sup>125</sup> Cognitive dissonance theorists argue, in contrast, that attitudes toward exit become more positive as

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1 (1996), available at <http://fatherhood.hhs.gov/SIPP/noncustp1.htm> (reporting that 31.7% of nonresident fathers had not visited their children in the past year). Ten years after divorce, almost two-thirds of noncustodial fathers have no contact with their children. FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 35–36 (1991).

123. Michael E. Lamb, *Placing Children's Interests First: Developmentally Appropriate Parenting Plans*, 10 VA. J. SOC. POL'Y & L. 98, 108 (2002) (noting that divorced fathers are often absent, while “never-married fathers are more than twice as likely as divorced fathers to have no contact with their children”).

124. Lingxin Hao & Guihua Xie, *The Complexity and Endogeneity of Family Structure in Explaining Children's Misbehavior*, 31 SOC. SCI. RES. 1, 5–6 (2002) (discussing the differential reproductive investments between men and women).

125. Paul R. Amato & Stacy J. Rogers, *Do Attitudes Toward Divorce Affect Marital Quality?*, 20 J. FAM. ISSUES 69, 69 (1999) (making this observation about spouses who have favorable attitudes toward divorce).

relationship quality slides.<sup>126</sup> In a clever study designed to determine which comes first—attitudes more accepting of exit or less satisfying relationships—Amato and Rogers found “stronger support for the exchange theory hypothesis.”<sup>127</sup> Specifically, they found that favorable attitudes toward exit “undermine[s] [the relationship’s] quality in the long run.”<sup>128</sup> Amato and Rogers used three measures of a relationship’s quality: self-reported happiness with the relationship, marital interaction or how often the couple engaged in joint activities, and marital conflict.<sup>129</sup>

While marital happiness declined for all respondents over a space of three years, it dropped off most dramatically for those who became most comfortable with the idea of exiting. Among individuals who were least supportive of divorce, happiness dropped off a tenth of a standard deviation (-.10), while happiness declined by -.21 among those with moderate support for divorce.<sup>130</sup> Among those most supportive of divorce, “happiness declined by more than one half of a standard deviation (-.54).”<sup>131</sup>

Marital interaction and marital conflict traced similar patterns. “[T]hose who adopted less supportive attitudes toward divorce experienced the smallest decline in [marital] interaction, whereas those who adopted more supportive attitudes toward divorce experienced the largest decline.”<sup>132</sup> Finally, “those who adopted more supportive attitudes toward divorce reported an increase in marital conflict.”<sup>133</sup>

Exchange theorists have long speculated that “likelihood of marital dissolution is increased to the extent that people receive few rewards from the relationship, face few barriers to ending the relationship, and perceive good alternatives to the relationship.”<sup>134</sup> Amato and Rogers argue that rewards and barriers do not exert discrete influences on marital breakdown, but are dynamic. “[P]eople’s attitudes toward marriage and divorce affect their motivation to invest resources in their relationships; these investments, in turn, can have long-term implications for the extent to which people experience their relationships as rewarding.”<sup>135</sup> While Amato and Rogers recognize that “most people enter marriage with a strong commitment to their partners,” married adults are not uniform in

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126. *Id.* at 72.

127. *Id.* at 69. Amato and Rogers used national, longitudinal data to isolate the causal relationship. *Id.* at 84.

128. *Id.* at 69.

129. *Id.* at 73.

130. *Id.* at 83.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 71.

135. *Id.*

their commitment to permanence. Instead there are spouses who are better and worse exit risks. Amato and Rogers speculate that:

[c]ompared with people who strongly support the norm of lifelong marriage, those with a weaker level of support may invest less emotion and time in their relationships and be less inclined to make costly personal sacrifices for their spouses. They may also make fewer efforts to reach mutually satisfying resolutions to disagreements, assuming that, after a certain point, it is easier to terminate unhappy marriages than to exert additional energy in reconciliation. The result of this individualistic orientation is likely to be a gradual erosion of relationship quality.<sup>136</sup>

Other studies confirm that the perceived obligation to stay together positively correlates not only with commitment, but also with relationship satisfaction.<sup>137</sup>

The interlocking nature of relationship quality, investment in the relationship, and ease of exit acts as a “double whammy” for cohabitants. Many adults who choose to cohabit may not have rejected marriage and the norms of permanence that marriage signifies.<sup>138</sup> They simply have decided not to marry their *present* partner.<sup>139</sup> Many may expect to, and do, exit the relationship in several years. In view of this latent uncertainty, it is hardly surprising that cohabitants might spend less energy and time on the relationship. Studies give some support for this possibility.

Cohabitants do not make “early and frequent joint investments,” as married couples do, meaning that cohabitants have few “sunk costs” in the relationship that would make exit less desirable.<sup>140</sup> Cohabitants often do not combine resources, choosing instead to maintain separate bank accounts and hold property in their separate names.<sup>141</sup> All of this adds

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136. *Id.*

137. Chante L. Cox et al., *Prescriptive Support and Commitment Processes in Close Relationships*, 60 SOC. PSYCHOL. Q. 79 (1997).

138. Garrison, *supra* note 41, at 844.

139. Forty percent of cohabitants split up within five years, while 55% marry one another. Smock, *supra* note 100, at 3. For many cohabitants, the whole purpose of not marrying is not to make a long-term commitment to their present partner.

140. Julie Brines & Kara Joyner, *The Ties That Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 AM. SOC. REV. 333, 335 (1999). The antipathy to joint investments makes sense in light of the fragility of cohabiting relationships. As Brines and Joyner explain, “[w]hen couples choose to cohabit, the choice signals uncertainty and a short-term time horizon, prescribing a cautious approach to the relationship that might produce patterns of sharp bargaining between partners.” *Id.* at 335.

141. *Id.* at 339 (noting the tendency among unmarried partners to keep “separate purses”).

up to “me and me” rather than “we.” This lack of “we-ness” extends beyond the big purchases and life decisions. Summarizing a study in which researchers asked married and unmarried, co-resident couples how they would spend \$600, Garrison notes:

The married couple immediately focused on a shared goal:

Caroline: I think we should spend it on ourselves.

Chris: Okay, what do we need?

Caroline: We have things we need. Let’s spend it on something we both want, not just something one or the other wanted . . . I’ve been thinking of something like airline tickets to Hawaii. You’ve been wanting to go to Maui. I think it would be nice for us.

Chris: Okay, that’s perfect. Sold.<sup>142</sup>

The cohabiting couple immediately focused on their individual wants:

Susan: Split it fifty-fifty, right?

Mark: Exactly.

Susan: We’re finished.

Mark: Same as always.

Susan: Fifty-fifty.

Mark: I’ll spend at least two hundred dollars on photographic equipment . . . and probably pay off something to Visa . . . .

Susan: And I’ll spend mine my way. Very simple.<sup>143</sup>

Instead of negotiating a purchase that is “yours and mine,” cohabitants divvy up the money for individual purchases.<sup>144</sup> This is in sharp contrast to the classic description of marriage as a social construction in which

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142. Garrison, *supra* note 41, at 842 (citing PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 98 (1983)).

143. *Id.*

144. It is notable that the fairness norm in cohabiting couples appears to be fifty-fifty. Cf. Haijin Lin and Shyam Sunder, *Using Experimental Data to Model Bargaining Behavior in Ultimatum Games*, (Yale Sch. of Mgmt. Working Paper, Paper No. ES-08, 2001), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=268755](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=268755).

two adults are part of an object distinct from themselves—the marriage.<sup>145</sup> Instead of reflexively acting, or identifying themselves, as part of a single entity, cohabitants generally view themselves as individuals who just happen to live with someone else. Importantly for our purposes here, it would be surprising if a cohabitant was self-interested in the adult relationship and selfless in the parent-child relationship, although it is possible that some individual cohabitants may be.

In sum, given the limited time horizon for many cohabiting relationships, cohabitants as a group appear—quite rationally—to withhold the kind of investment and effort likely to make the adult relationship an enduring one. As the next section explores, this walk-away prerogative is particularly damaging to children, whose relationships with the adults in their lives frequently begin and end with the biological parent's choice to share a home with that adult.

### 3. *Possible Mechanisms for the Transformative Power of Marriage*

What adults do in their relationships affects, feeds into, and impacts their relationships with children, even biological ones. The precise mechanism through which marriage may exert this transformative power is not readily apparent, however, and may be an aggregation of several phenomena.

The greater permanence that marriage signifies may improve the quality of the adult relationship in ways that benefit children in the household. Relational contract theory predicts that parties to longer-term relationships do not engage in sharp bargaining or tit-for-tat reciprocity, spiking each other for every perceived fault.<sup>146</sup> Expectations of permanence and stability shape the interactions between adults in ways that should not be surprising. Brines and Joyner note:

When couples choose to cohabit, the choice signals uncertainty and a short-term time horizon, prescribing a cautious approach to the relationship that might produce patterns of sharp bargaining between partners. On the other hand, when

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145. Peter Berger & Hansfried Kellner, *Marriage and the Construction of Reality*, 46 *DIAGENES* 1 (1964).

146. See Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 *N.C. L. REV.* 551, 577–78 (1999) (noting how parties to relational contracts do not “conduct a series of tit-for-tat transactions”); see also Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 *VA. L. REV.* 1225, 1251 (1998); Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 *BUFF. L. REV.* 763, 765 (1998); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 *WIS. L. REV.* 483, 487 (1985).

high expectations of permanence accompany the decision to share a household . . . these expectations encourage early and frequent joint investments.<sup>147</sup>

Cohabiting relationships differ from marital ones in other ways that harden the interactions between the adults. For instance, the norm and expectation in cohabiting relationships is one of “equal power-sharing,” unlike marriage where spouses generally arrive at an unequal division of labor.<sup>148</sup> In intimate relationships, “[e]quality is a costly principle to maintain, in part because it requires frequent monitoring of each partner’s holdings,”<sup>149</sup> a phenomenon the child may witness and be impacted by.

Marriage may exert more direct effects on parenting as well. Investment in children may follow legal obligation. Thompson, McLanahan and Curtin explain that “[s]tepparents have stronger legal and normative obligations to children than do cohabiting partners, and are therefore more likely to invest time and energy in the parental role.”<sup>150</sup> Alternatively, marriage may carry expectations of shared parenting that mere co-residence does not. As Manning and Lamb speculate, “[t]he act of remarriage may carry with it a more pronounced expectation of stepfather involvement (for example, spending time with stepchildren and contributing financially to their upbringing) that has positive consequences for child well-being.”<sup>151</sup>

It may be that marital fathers are willing to invest more heavily in their “children” than nonmarital ones because norms of fidelity in the marital relationship are stronger, warranting their certainty that any investment they make is really in their biological child. A cohabiting “biological” father may simply not be as confident that a child is really his, as he might be in a marital relationship, and discount his investment accordingly.<sup>152</sup>

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147. Brines & Joyner, *supra* note 140, at 335; *see also* Scott & Scott, *supra* note 146, at 1256 (“A relationship that serves the many functions of marriage requires significant investments on the part of each spouse. Each party’s willingness to make that investment understandably depends on trust that the partner generally can be relied upon to fulfill her end of the bargain.”).

148. Brines & Joyner, *supra* note 140, at 350; Margaret Brinig, *Domestic Partnerships and Default Rules*, in RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson ed., 2006) (summarizing research demonstrating that “cohabiting couples are less specialized than married couples, are less interdependent, and have far more embedded equality goals”).

149. Brines & Joyner, *supra* note 140, at 351.

150. Elizabeth Thompson et al., *Family Structure, Gender, and Parental Socialization*, 54 J. MARRIAGE. FAM. 368, 370 (1992).

151. Manning & Lamb, *supra* note 12, at 890. Because Manning and Lamb did not gauge role ambiguity, they could not exclude it as the clarifying difference between married, nonbiological fathers and unmarried ones. *Id.*

152. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1036 (2003).

Greater uncertainty among cohabitants would be warranted since expectations of sexual fidelity are considerably weaker for cohabiting couples.<sup>153</sup> Alternatively, marriage may simply bring with it a defined set of parenting norms that cohabitants, lacking these, must develop on a blank slate for themselves. Parenting in cohabiting relationships is a relatively recent phenomenon,<sup>154</sup> so norms have not evolved to guide the couples in the relationship.<sup>155</sup> Hao and Guihua suggest that when parent-figures lack clear rules on how to supervise children, this in turn weakens parental control, leading to juvenile delinquency and behavioral problems among cohabiting children.<sup>156</sup> While a lack of expectations about a cohabitant's parenting role may jeopardize positive outcomes for the child, lowered expectations may also do so. Cohabiting couples may affirmatively expect the biological parent's partner to be less involved, as stepfathers and stepmothers often do.<sup>157</sup> Of course, although a lack of norms may explain the outcome differences observed by Manning and Lamb, it cannot readily explain investment differences reported by Hofferth and Anderson. Hofferth and Anderson studied biological parents who never married. The norms of investment in biological children are well-established.<sup>158</sup>

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153. See Garrison, *supra* note 41, at 841 & n.100 (summarizing evidence of lower sexual fidelity among cohabitants). Prof. Garrison documents that “male and female cohabitants were less likely to be sexually faithful than married men and women at all relationship-duration levels” and that “twice as many cohabitants as married individuals ha[ve] engaged in recent infidelity” in studies that control for background characteristics. *Id.*

154. *Id.* at 876. “[R]elatively few children [have] lived in cohabiting unions” before now. *Id.*

155. *Id.* at 879 (speculating that “[f]amily roles may not be as clearly established in cohabiting stepfamilies, perhaps creating confusion over parenting responsibilities and weak child-stepparent relationships”). *Id.* at 890 (observing that “[m]arried stepfathers may have a more clearly defined obligation to their stepchildren than cohabiting stepfathers”). This arguably stems in part from the fact that “cohabiting unions with children present still do not benefit from legal and social recognition.” *Id.* at 878. For an argument that legal recognition will do considerable harm, see *id.* at 818 (arguing that a “conscriptive model” that would “impose[] on the cohabiting couple . . . some or all of the obligations the couple would have incurred had they chosen to marry” will diminish the importance of marital commitments and dishonors cohabitants’ individual choice to remain independent).

156. Hao & Xie, *supra* note 124, at 1–28.

157. See *supra* note 35 and accompanying text.

158. In blended families, the shortfall for nonbiological children is easily explained. First, there are differences in co-residence. Blended families may be newer relationships and the father may have been in the household for a shorter period of time. Hofferth & Anderson, *supra* note 11, at 230 (noting that “[f]athers are . . . more involved with

#### IV. SOME CAUTIONS ABOUT MARRIAGE PROMOTION EFFORTS

The question we began with is whether the state is justified in supporting marriage at all. The Hofferth and Anderson and Manning and Lamb studies bring us as close as we have come to date to an apples-to-apples comparison—that is, to isolating the value of marriage and identifying the nexus between supporting marriage and supporting children. And this is important in its own right. As Schneider aptly remarked in another context, “It is no doubt true that you cannot get from *is* to *ought*. But you ought to know what *is* is before you say what *ought* ought to be.”<sup>159</sup>

Absent longitudinal analyses,<sup>160</sup> this pair of studies is likely to be as good as the science gets any time soon—and that’s fine. Social science can illuminate certain effects, but it cannot answer the tough value choices that have to be made at the limits of our knowledge.<sup>161</sup> Two polar solutions are being offered with respect to the state’s role in marriage: pull the state out of marriage entirely or use the state to put more people into marriages. The data seem to suggest that a preference for the second goes well beyond “nostalgia for the single-breadwinner ‘traditional’ family of the 1950s.”<sup>162</sup> Instead it can be grounded in

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children with whom they have lived longer”). He may not have lived as long with the non-biological child as a biological father would have. *Id.* at 222 tbl.2. All are predictors of lower investment in a child. *Id.* at 215–16. Of course, none of this readily explains why the biological child of cohabitants consistently fares worse than a biological child of married parents, in both blended and nonblended households. But the answer may lie in the blendedness of the family, rather than in the lack of marriage. Complicated dynamics and “unstable alliances” are present in any blended household. Marsiglio, *supra* note 12, at 22. The mother’s partner “must negotiate [his] place[] within a pre-existing family dance that has been orchestrated by the birth mother and jointly performed with her child(ren).” *Id.* Many “birth mothers exert tremendous direct and indirect power” to affect the male cohabitant’s relationship to the mother’s biological child “as gatekeepers and facilitators.” *Id.* at 35. Thus, a mother’s limit-setting with respect to her partner’s parenting of her biological child may well spill over into his relationship to their child in common.

159. Carl E. Schneider, *Bioethics with a Human Face*, 69 IND. L.J. 1075, 1077 (1994).

160. Manning & Lamb, *supra* note 12, at 891 (noting that cross-sectional studies cannot resolve questions of selection bias and arguing for longitudinal studies to answer definitively a host of causality questions).

161. See David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue* 51 (2005) (unpublished manuscript, on file with the San Diego Law Review) (discussing the role of “personal preference when a claim [is] not supported by data”); Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. CAL. INTERDISC. L.J. 631, 684 (1994) (noting that social science “research cannot replace the normative aspects of decision making” although it can “help decision makers to be better informed about policy problems and possible solutions”).

162. WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 285 (1991).

sophisticated studies that confirm that marriage confers a measurable benefit to children. Clearly, if Hofferth and Anderson and Manning and Lamb had found no “marriage advantage,” that result would have pointed us in another direction entirely. But they did not.

A number of researchers have argued recently that family stability, rather than family structure, drives child well-being.<sup>163</sup> Presumably for this reason, public policy should key to stability, rather than marriage itself. It is true that marriage may simply be a proxy for stability and enduringness of the parent-child relationship.<sup>164</sup> Yet hand wringing over which is the root cause misses the point. If marriage fosters the stability that is conferring benefits on children, or is a consistent marker of that stability, then it does not really matter whether it is “marriage itself,” or stability, that confers the benefit: the child is still better off. The only reason we would parse the effect of marriage from stability is if the state could reliably foster stability in family relationships in some other way. To my knowledge, there is no such way.

Professor Adams asks in her commentary whether the state’s subsidy of marriage could be better spent in other ways.<sup>165</sup> This is precisely the type of question that legislatures should ask. No doubt it is true that, for instance, providing a subsidy directly to parents *could* yield high quality children in whom parents have heavily invested. However, the question is not whether we should strike out in this new direction. Instead the question is whether, once the legislature has acted (as it has here), the state is justified in continuing to support marriage. Studies like Hofferth and Anderson’s and Manning and Lamb’s suggest that in supporting marriage, the state is indeed indirectly supporting the investment in children.

Researchers worry that “[p]rograms that promote marriage without addressing the other complicated financial and relationship issues [that

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163. Hao & Xie, *supra* note 124, at 1; Hill et al., *supra* note 21, at 286–87; Lawrence L. Wu & Brian C. Martinson, *Family Structure and the Risk of a Premarital Birth*, 58 AM. SOC. REV. 210 (1993).

164. William A. Galston, *Divorce American Style*, 124 PUB. INT. 12, 19 (1996) (observing that “[t]he law of divorce determines the barriers to, and costs of, exit from marriage” and noting that “theory predicts what observation confirms: At the margin, lower barriers to exit produce a larger number of departures”).

165. Laura Adams, *Privileging the Privileged? Child Well-Being as a Justification for State Support of Marriage*, 42 SAN DIEGO L. REV. 881 (2005). She is not alone in raising this foundational question. See Bernstein, *supra* note 2, at 140 (arguing that the “welfare disparities between the married and unmarried could be eliminated more effectively” by abolishing marriage than by supporting it).

disadvantaged mothers and fathers] face seem unrealistic and prone to failure.”<sup>166</sup> Clearly, even if the hard data suggests that marriage benefits children, implementing a policy to get more children into married households will be a hard business. We face daunting tasks operationalizing it. We should expect that the message will be clumsy and that, at best, it will be implemented by well-intentioned bureaucrats. Every effort should be made to evaluate the success of these initiatives and to make adjustments accordingly.

Rather than failure, a more worrisome problem with marriage promotion efforts is that they might succeed.<sup>167</sup> Some may see in the linkage between marriage and child well-being more influence for the state than it can reasonably be expected to exert. In fact, some efforts to promote marriage seem to suggest that if we could just induce someone into a marriage, they and their children would be better off. Robert Rector, a senior research fellow at the Heritage Foundation, suggested several years ago that the state pay “\$5,000 bonuses [to] women at risk of having out-of-wedlock births to encourage them to marry—and stay married.”<sup>168</sup> Even without a cash bonus, significant support for marriage—and therefore inducements to marry—already exist for those who choose to marry. Given all the incentives that now exist to marry (putting aside same-sex couples who are restricted from entry into marriage in states other than Massachusetts), such subsidies may well induce marginally-committed couples to marry, seeding the chances for continuing marital dissolution and weakening norms of fidelity, selflessness and commitment associated with marriage. To the extent that bonuses or other “deal-sweeteners” induce less committed couples to simply take the leap—but do not somehow transform their behavior in the relationship to approximate marital norms—the benefits they would receive will have come at a price: weakening the institution of marriage. To make an analogy, inducing marginally-committed couples to marry may work a little like osmosis. When we add salt to a solution separated by a barrier, ions move across the barrier until the salinity on each side equalizes.

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166. Hofferth & Anderson, *supra* note 11, at 231.

167. As Professor Galston reminds us, “the evidence now available forbids us to conclude that law is powerless to affect conduct.” Galston, *supra* note 164, at 19.

168. See Abraham McLaughlin, *Bush’s Controversial Bid to Promote Marriage*, CHRISTIAN SCI. MONITOR, June 4, 2001, available at <http://www.contemporaryfamilies.org/public/articles/change3.htm>; *Oversight Hearing on “The Federal Deposit Insurance System and Recommendations for Reform” Before the S.H. Comm. on Banking, Housing & Urban Affairs* (May 1, 2002) (prepared statement of Robert Rector, Senior Research Fellow, The Heritage Foundation), available at [http://banking.senate.gov/02\\_05hrg/050102a/rector.htm](http://banking.senate.gov/02_05hrg/050102a/rector.htm) (May 1, 2002).

We should be careful, however, to distinguish between the state's traditional subsidies of marriage and newer, more direct forms of educational assistance to couples to form marriages. In contrast to naked subsidies, more recent marriage promotion efforts seek to equip couples, "on a voluntary basis, [to] acquire the skills and knowledge necessary to form and sustain a healthy marriage."<sup>169</sup> Only if such efforts succeed in equipping cohabitants to transform their fleeting relationships will they and their children benefit from marriage without destroying it from within.

## V. CONCLUSION

Two carefully constructed recent studies have suggested that marriage produces real differences in investment and outcomes for children in marital households. Because the studies used different data sets and comparison groups to isolate the impact of marriage, the differences they uncover are surely more than statistical blips. Certainly, selection effects may explain the results in any correlational study. Nonetheless, a rich literature on cohabiting and marital relationships suggests that marriage provides a substrate of relationship characteristics among the adults that inure to the benefit of their children, with heightened investment in an enduring relationship foremost among these. Such studies provide a compelling justification for state support of marriage. By supporting marriage, the state *is* supporting children.

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169. U.S. DEP'T OF HEALTH AND HUMAN SERVS. ADMIN. FOR CHILDREN AND FAMILIES, ACF HEALTHY MARRIAGE INITIATIVE MISSION STATEMENT (2005), <http://www.acf.hhs.gov/healthymarriage/about/mission.html>.

Figure 1

