

Privileging the Privileged? Child Well-Being as a Justification for State Support of Marriage

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Is the state justified in supporting marriage? This is the question that Robin Wilson seeks to answer by an examination of the effect of marriage on child well-being. Proceeding from the assumption that child well-being is a key consideration in deciding whether state support for marriage is justified, Wilson examines two recent social science studies that have concluded that children living in households with their married, biological parents are better off than other children and further, that it is marriage rather than biological relationship that generates this benefit for children.¹ Based on this social science literature, Wilson draws the normative conclusion that the state should continue to support, and perhaps even actively promote, marriage.

I. WILSON'S ANALYSIS OF THE STUDIES

The first of the pair of studies Wilson examines, by Manning and Lamb, focuses on child well-being by examining outcomes for adolescents in

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1. Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847 (2005).

various family structures.² The second study, by Hofferth and Anderson, examines paternal investment in children.³ Both studies broke new ground by seeking to isolate the effects of marriage from the effects of biological relationship, largely by comparing four types of households: married households with two biological parents; married households with one biological parent; unmarried households with two biological parents; and unmarried households with one biological parent.⁴ These studies, and apparently almost every study done in the area, conclude that children in “nuclear families”—married households with two biological parents—have a greater level of well-being than other children.⁵ Moreover, both studies conclude that it is marriage itself that explains this difference in child well-being.⁶

After analyzing the studies, Wilson delves further into the question of causation. She offers reasons to be skeptical of the conclusion that it is *marriage itself* that makes the difference for children, and she posits some alternative explanations for the results of the studies.⁷ Ultimately though, Wilson agrees that marriage itself has the power to make a difference in the lives of adults and children.⁸ Leaving aside her initial skeptical stance, Wilson devotes considerable attention to making the case for the transformative power of marriage, analyzing reasons for differences between cohabiting and marital relationships from the standpoint of adults and that of children.⁹ Wilson concludes by making the case for supporting marriage. She posits the binary choice of pulling the state out of marriage entirely or using the state “to put more people into marriages” and asserts that the studies she analyzes support a preference for the second course of action—encouraging more people to marry.¹⁰

2. Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 879 (2003).

3. 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).

4. See Wilson, *supra* note 1, at 860. See also Manning & Lamb, *supra* note 2, at 879–80; Hofferth & Anderson, *supra* note 3, at 213, 219.

5. Wilson, *supra* note 1, at 861–62. See also Manning & Lamb, *supra* note 2, at 885; Hofferth & Anderson, *supra* note 3, at 229–30.

6. Wilson, *supra* note 1, at 859, 864. See also Manning & Lamb, *supra* note 2, at 890; Hofferth & Anderson, *supra* note 3, at 230.

7. See Wilson, *supra* note 1, at 865–67. See also Kimberly A. Yuracko, *Does Marriage Make People Good or Do Good People Marry?*, 42 SAN DIEGO L. REV. 889, 893–94 (2005).

8. Wilson, *supra* note 1, at 867.

9. *Id.* at 868–73.

10. *Id.* at 876.

II. THE CHOICE OF A CHILD-CENTERED APPROACH TO EVALUATING MARRIAGE

Wilson has chosen a child-centered approach to evaluating the meaning of marriage and this choice merits some attention. The primary question Wilson seeks to answer is whether the state should support marriage, which appears to mean, at a minimum, whether the state should subsidize marriage, and more radically, whether the state should retain the institution at all.¹¹ A secondary and related question is whether the state should actively promote marriage, which presumably means whether the state should seek to push people into marriage.¹² These are two different, though related questions. To answer these questions, Wilson assumes that “one important consideration” in retaining state support for marriage is whether marriage increases child well-being.¹³ Recognizing that this assumption is open to some challenge, this commentary proceeds on the shared assumption that child well-being is in fact a significant consideration in evaluating state support for marriage.¹⁴

III. DOES MARRIAGE *BEST* PROMOTE CHILD WELL-BEING?

Once one places the promotion of child well-being at the center of the meaning of marriage, one should also examine whether marriage *best* promotes child well-being, and not simply whether marriage has some positive effect on child well-being. And if the answer is that marriage is not the best way to promote child well-being, that conclusion may mean that child well-being does not provide a good justification for supporting or promoting marriage.

Wilson addresses the possibility that the state might have better ways to promote child well-being than the more indirect method of supporting marriage, notably through direct parental subsidies.¹⁵ However, in her view, “the question is not whether we should” provide direct state support to parents rather than indirect support through marriage benefits, but

11. *Id.* at 848–49.

12. *Id.* at 848.

13. *Id.* at 849.

14. However, as discussed, *infra* p. 884–85, it is a factor that should be placed in context with other relevant factors.

15. Wilson, *supra* note 1, at 877 (“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.”).

“whether . . . the State is justified in continuing to support marriage.”¹⁶ Wilson argues that because state support for marriage indirectly supports investment in children, state support for marriage is justified from the standpoint of child well-being.¹⁷ Presumably, this means that even if marriage is not the optimal way to achieve child well-being, it is a sufficiently good proxy that it should be encouraged.

Wilson’s argument proceeds from a pragmatic stance. The institution of marriage exists, as a legislative and social choice, whereas our society seems unlikely in the near future to adopt an alternative dependency system with the power to impact positively real children’s lives.¹⁸ While a pragmatic focus on child well-being has a good deal of merit, it nonetheless downplays many legitimate concerns about the social costs of perpetuating the current institution of marriage. Thus, it is helpful to consider both those social costs and the nature of the positive effect on child well-being.

IV. WHICH CHILDREN FARE BETTER BECAUSE OF MARRIAGE? THE NATURE OF THE POSITIVE EFFECT ON CHILD WELL-BEING

To determine whether child well-being provides sufficient justification for state support of marriage even if marriage is not the best way to achieve child well-being, it is useful to consider what child well-being means. Manning and Lamb and Hofferth and Anderson employ various indices of child well-being, which Wilson implicitly adopts, and conclude that children in marital homes fare better on these indices.¹⁹ However, neither Wilson nor the authors of the underlying studies focuses on the related question of *which* children are likely to be found in these marital homes and thus, which children’s well-being we maximize by supporting marriage.

When one looks at which children do better because of marriage, one might well conclude that we should eliminate any state bias in favor of marriage, rather than continue to support marriage. Children are not randomly distributed in married and unmarried households. Rather, children in married households are whiter, wealthier, and have better

16. *Id.*

17. *Id.*

18. Other commentators have constructed more radical alternatives to socio-legal support of marriage. For example, Martha Fineman argues for a radical social and legal transformation in MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

19. *See, e.g.*, Wilson, *supra* note 1, at 860 (children’s verbal ability and success in school) and *id.* at 11–12 (paternal engagement in activities with children and self-reported “warmth” towards children).

educated parents for reasons other than marriage itself.²⁰ Thus, state support for marriage maximizes the welfare of children who are already the most privileged. State support for marriage provides far less benefit to children who are less privileged in terms of race and socioeconomic status. Indeed, by maximizing the welfare of the privileged group of children, state support for marriage may actually *reduce* the welfare of less privileged children on an absolute as well as a comparative basis.

Thus, the fact that children in married, biological families fare best *does not necessarily mean* that we should engage in marriage support or promotion. To the contrary, it may well mean that we should eliminate any state bias in favor of marriage, even if we do not go so far as to abolish marriage as a civil institution. Anita Bernstein has made the related argument that we can more effectively eliminate welfare disparities between the married and the unmarried by abolishing marriage rather than by supporting it.²¹ In the specific context of child well-being disparities, eliminating state support for marriage could result in children in the aggregate being better off because elimination of support for marriage would likely result in a redirection of social welfare policy toward the direct support of children.²² Thus, Wilson argues in favor of supporting marriage from the pragmatic perspective that no viable social welfare substitute exists that will increase child well-being.²³ But, a viable social welfare substitute seems unlikely to develop as long as marriage continues to exist.

Once one makes the assumption that child well-being is a key consideration (and perhaps the sole consideration for many) in whether to retain state support for marriage, then it may be insufficient to argue simply that child well-being provides *some* support for marriage. Rather, one should ask how child well-being can be maximized. And when one asks that question, state support of marriage may not be the answer.

20. See TERRY LUGAILA & JULIA OVERTURF, CHILDREN AND THE HOUSEHOLDS THEY LIVE IN: 2000, U.S. CENSUS BUREAU (2004), available at <http://www.census.gov/prod/2004pubs/censr-14.pdf>.

21. Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 140–41 (2003).

22. Certainly, children currently privileged by state support of marriage might be worse off under such an approach. However, this might be justifiable on egalitarian principles or, alternatively, using the Kaldor-Hicks criterion. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13 (6th ed. 2003) (under Kaldor-Hicks analysis, a rule or action is economically efficient if the winners' gains exceed the losers' losses, thereby increasing aggregate social wealth).

23. Wilson, *supra* note 1, at 877.

V. IS CHILD WELL-BEING ALONE A SUFFICIENT JUSTIFICATION
FOR MARRIAGE? ADDITIONAL SOCIAL COSTS OF STATE
SUPPORT FOR MARRIAGE

Further, if one can make only the relatively weaker claim that some children's well-being will be maximized by state support for marriage (possibly at the expense of other children), then child well-being alone does not provide sufficient justification for state support or promotion of marriage. Rather, it becomes necessary to situate any justification for marriage based on child well-being within the context of additional justifications for marriage. Child well-being may still contribute to a justification of marriage, but only if one has additional reasons to favor state support of marriage.²⁴

In Wilson's view, "[t]he 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."²⁵ However, one reason to attempt to isolate the effect of marriage itself from the effects of stable family structures is the likelihood that state support for marriage is actually *harming* some members of society. For example, state support for marriage, as currently conceived, has detrimental effects on people who are not in heterosexual relationships because they cannot access the symbolic or concrete benefits of marital status. Some commentators also argue that state support for marriage runs counter to women's interests.²⁶

VI. ON MARRIAGE PROMOTION

Wilson is firm in her conclusion that child well-being justifies continued state support of marriage.²⁷ However, Wilson is far more ambivalent and tentative about any claim that child well-being might justify the active promotion of marriage by the state.²⁸ Thus, the normative implications of the social science studies for marriage promotion, as it might theoretically be conceived or as it is actually practiced by the government or private groups, remain to be fleshed out.

One way to think about this problem is to ask, if the state required everyone to be married in order to live in a household with children, would children be any better off? Wilson expresses well-founded concern

24. Wilson does not focus on, but certainly does not exclude from consideration, the negative effects of marriage. *Id.* at 878.

25. *Id.* at 877.

26. *See, e.g.,* FINEMAN, *supra* note 18, at 118–19.

27. Wilson, *supra* note 1, at 877.

28. *Id.* at 878.

that inducing less-committed couples to marry will further weaken the institution of marriage and eventually result in an equilibrium state between marriage and cohabitation, presumably with concomitant ill effects on child well-being.²⁹ However, this concern coexists in tension with Wilson's optimism about the transformative power of marriage. Ultimately, she concludes simply by expressing hope in the transformative power of marriage.³⁰ This commentary concludes more pessimistically.

29. *Id.* at 878.

30. *Id.* at 879.

